SUPREME COURT OF THE UNITED STATES.

No. 16[illegible]

JAMES E. MUNFORD, PLAINTIFF IN ERROR,

vs.

C. OTIS WARDWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 UNITED STATES OF AMERICA,
Northern District of California:

Pleas before the judges of the circuit court of the United States in and for the northern district of California, at the court-house, in the city of San Francisco, at the regular June term, 1863.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Be it remembered, that at the regular June term, A. D. 1863, before the Hon. Stephen J. Field, associate justice of the U. S. Supreme Court, and Hon. Ogden Hoffman, U. S. district judge, at the court-house, in the city of San Francisco, came James E. Munford, by his counsel, James B. Townsend, esq, and brought into court before the aforesaid judges thereof his certain complaint or declaration against C. Otis Wardwell, defendant, of a plea of trespass and ejectment; which said complaint was filed on the 25th day of September, 1862, and follows in these words, that is to say:

2 UNITED STATES OF AMERICA,
Northern District of California:

In the circuit court of the United States for the districts of California.

Complaint.

JAMES E. MUNFORD, pl'ff,
vs.
C. OTIS WARDWELL, def't. } At common law.

The said plaintiff, who is a citizen and resident of the State of Missouri, complains of the said defendant, who is a citizen of California and a resident of said northern district, and for cause of action states that heretofore, to wit, on the 24th day of February, A. D. 1862, the said plaintiff was, and has ever since continued to be and now is, the owner of an estate of inheritance in fee simple in, and entitled to the possession of, that certain lot of
3 ground, with the improvements thereon, and appurtenances thereunto belonging and appertaining, situated in the city and county of San Francisco, and within said northern district, described as follows, to wit: Commencing at a point in the northwesterly line of Brannan street, two hundred and seventy-five (275) feet southwestwardly from the southwesterly line of Fourth street; thence northwestwardly, parallel to said line of Fourth street, two hundred and seventy-five (275) feet; thence southwestwardly, parallel to said line of Brannan street, two hundred and seventy-five (275) feet; thence southeastwardly, parallel to said line of Fourth street, two hundred and seventy-five (275) feet, to said line of Brannan street; thence northeastwardly, along said line of Brannan street, two hundred and seventy-five (275) feet, to the point of commencement; said lot being known as one-hundred vara lot, number one hundred and eighty-six (186,) as
4 laid down, numbered, and represented on the official map of said city of San Francisco.

And that said plaintiff was likewise, on said 24th day of February, A. D. 1862, in possession of said lot of ground, improvements, and appurtenances, and so remained and continued in possession thereof until afterwards, to wit: on the same day, said defendant with force and arms, entered into and upon said lot of ground, improvements, and appurtenances, and ejected, expelled, and removed said plaintiff therefrom, and thence to the present time has unlawfully and wrongfully withheld, and still unlawfully and wrongfully withholds, from said plaintiff the possession of said lot of ground, improvements, and appurtenances, to his great damage, to wit, in the sum of two thousand dollars.

Wherefore said plaintiff prays judgment against the said defendant, for the possession of said lot of ground, with its improvements and appurtenances, and for his damages aforesaid, in the sum of two thousand dollars, and for his costs and disbursements in this action.

San Francisco, Sept. 25th, 1862.

JAS. B. TOWNSEND, *Pl'ff's Att'y.*

Endorsed: Filed Sept. 25, 1862.

HENRY C. HYDE, *Clerk.*

Summons.

UNITED STATES OF AMERICA:

In the circuit court of the United States for the districts of California, in and for the northern district.

JAMES E. MUNFORD, plaintiff,
vs.
E. OTIS WARDWELL, defendant.

Action brought in the said circuit court, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said circuit court.

The President of the United States of America, greeting, to C. Otis Wardwell:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States for the districts of California, and to file your plea, answer, or demurrer to the complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court, in the city and county of San Francisco, within ten days (exclusive of Sundays and day of service) after the service on you of this summons, if served in this county; or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover the possession of a certain tract of land, with its improvements and appurtenances, situated in the city and county of San Francisco, northern district of California; also two thousand dollars damages, and costs of suit; all of which is more particularly set forth in the complaint. And if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States of America, this 25th day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-seventh.

Attest:

[SEAL.] HENRY C. HYDE, *Clerk.*

Marshal's return.

OFFICE OF THE MARSHAL OF THE NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I hereby certify that I received the within summons on the 25th day of September, A. D. 1862, and personally served the same on the 26th day of September, A. D. 1862, by delivering to C. Otis Wardwell, said defendant, personally, in the city and county of San Francisco, a copy of said summons, attached to a certified copy of the complaint.

Dated San Francisco, twenty-sixth September, 1862.

CHAS. W. RAND, *Marshal,*
By M. R. GRANT, *Deputy Marshal.*

Endorsed: Filed this 26th day of September, A. D. 1862.

HENRY C. HYDE, *Clerk.*

9 And afterwards, to wit, on the 4th day of October, A. D. 1862, comes the defendant, Charles Otis Wardwell, by his attorneys, J. J. Papy and Gregory Yale, esqs., and files his answer in the words and figures following, to wit:

Answer.

U. S. circuit court, districts of California.

JAMES E. MUNFORD,
vs.
CHARLES OTIS WARDWELL.

Charles Otis Wardwell, the defendant, for answer to the plaintiff's complaint herein, comes and defends the force and injury when, &c., und says that he is not guilty of the said supposed trespass and ejectment or ouster therein laid to his charge, or of any part thereof, in manner and form as the said plaintiff hath thereof complained against him; and he further specifically denies each and every allegation in said plaintiff's complaint
10 mentioned and set forth.

And for further answer defendant says that he is the owner of said premises under good title, and is now, and for a long time past has been, in the possession thereof under said title.

Wherefore defendant prays judgment that he may be hence dismissed with his costs and charges expended in this behalf.

J. J. PAPY & GREGORY YALE,
Att'ys for Def't.

Endorsed: Filed Oct. 4th, 1862.

HENRY C. HYDE, *Clerk.*

11 And afterwards, to wit, on the 7th day of November, A. D. 1862, comes the said plaintiff, by his attorney, James B. Townsend, esq., and files his replication in the words and figures following:

Replication.

In the circuit court of the United States for the districts of California, northern district.

JAMES E. MUNFORD, pl'ff,
vs.
CHARLES OTIS WARDWELL, def't.
} At common law.

The said plaintiff, for replication to the plea of said defendant by him secondly above pleaded, says that said defendant was not at the time of the commencement of this action, nor has he at any time since been, nor is he now the owner by good title, or otherwise, of the premises described in said complaint, nor of any part thereof.

Wherefore he prays judgment, &c., as in and by his said complaint
12 he has already prayed.

JAMES. B. TOWNSEND, *Pl'ff's Att'y.*

Endorsed.

NORTHERN DISTRICT OF CALIFORNIA,
City and county of San Francisco, ss:

Hermann Muller, being duly sworn by the undersigned, on his oath says that he served a copy of the within replication upon J. J. Papy, esq., attor_

ney for C. O. Wardwell, the within-named defendant, by delivering the same to the said Papy, personally, in the said city and county, on the 20th day of October, A. D. 1862, and leaving said copy with him.

(Signed) HERMANN MULLER.

Sworn to and subscribed before me this 6th day of November, A. D. 1862.

P. B. CORNWALL.

[SEAL.] P. B. CORNWALL, *Notary Public.*

Endorsed: Filed Nov. 7th, 1862.

HENRY C. HYDE, *Clerk.*

13 And afterwards, to wit, on the 20th day of August, A. D. 1863, the following order was duly entered of record in said cause, to wit:

Order of transfer.

At a regular term of the circuit court of the United States of America in and for the northern district of California, held at the court-house, in the city of San Francisco, on Monday, the 1st day of June, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The Honorable Ogden Hoffman, U. S. district judge.

J. E. MUNFORD vs. C. OTIS WARDWELL. } At common law. O. C. No. 465.

14 And now at this day it is ordered by the court that, in accordance with an act of Congress, entitled "An act to provide circuit courts for the districts of California and Oregon, and for other purposes," approved March 3d, 1863, all actions, suits, prosecutions, causes, pleas, process, and other proceedings relative to any cause, civil or criminal, heretofore pending in or returnable to the circuit court of the United States for the districts of California, in and for the northern district, be, and they are hereby, respectively transferred, made returnable, and continued to this court.

Endorsed: Filed this 20th day of August, 1863.

G. C. GORHAM, *Clerk,*
Pr. HYDE, *D. C.*

15 *Order setting cause.*

And afterwards, to wit, on the 20th day of August, A. D. 1863, the following was duly entered of record in said cause, to wit:

At a regular term of the circuit court of the United States of America, in and for the northern district of California, held at the court-house, in the city of San Francisco, on Thursday, the 20th day of August, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The Honorable Stephen J. Field, associate justice of the U. S. Supreme Court.

JAMES E. MUNFORD vs. C. OTIS WARDWELL. }

By consent of Mess. Townsend & Papy, ordered that this cause be set for August 26th, 1863.

16 *Proceedings in court.*

And afterwards, to wit, on the 26th day of August, A. D. 1863, being the day set for the trial of said cause, at the court-room aforesaid, at San Francisco, before the court aforesaid, the following proceedings were had in said cause and duly entered of record, to wit:

At a regular term of the circuit court of the United States of America, in and for the northern district of California, held at the court-house, in the city of San Francisco, on Wednesday, the 26th day of August, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The Honorable Stephen J. Field, associate justice of the U. S. Supreme Court.

JAMES E. MUNFORD } At common law.
vs.
C. OTIS WARDWELL. }

17 And now, at this day, come the parties to this cause, by their respective counsel, into court, J. B. Townsend, esq., for plaintiff, and Messrs. E. W. F. Sloan and J. J. Papy for defendant; and Edward Bosqui and E. F. Northam having been challenged peremptorily by plaintiff, the following named persons were duly empannelled and sworn as jurors, "the issue to try," &c., to wit:

Henry O. Howard, N. E. Grimes, James Wyer, Wm. A. Palmer, C. F. Webster, Robt. Merrill, Joseph Gordon, Wesley Diggins, John A. Risdon, A. C. Taylor, C. A. Eastman, Geo. Amerage; and the trial of this cause was duly proceeded with.

Wm. B. Cook, James Rice, and R. C. Hopkins were sworn and examined as witnesses on behalf of the plaintiff, and the evidence on both sides being closed the case was submitted to the jury.

18 The jury, having been instructed by the court, without leaving their seats, through their foreman rendered the following verdict, to wit: "James E. Munford *v.* C. Otis Wardwell. U. S. circuit court, northern dist. of Cal'a. We, the jury, find a verdict for plaintiff, subject to the opinion of the court. Geo. Amerage, foreman. San Francisco, Aug. 26, 1863."

Whereupon it is ordered that the further hearing of this cause be set for Saturday next, the 29th day of August, 1863.

Endorsed: Filed this 26th day of August, 1863.

GEO. C. GORHAM, *Clerk*,
Pr. HYDE, *D. C.*

19 *General verdict.*

And on the same day the following verdict was duly entered of record in the said cause, to wit:

U. S. circuit court, northern dist. of Cal'a.

JAMES E. MUNFORD }
v.
C. OTIS WARDWELL. }

We, the jury, find a verdict for the plaintiff, subject to the opinion of the court.

GEO. AMERAGE, *Foreman.*

San Francisco, Aug. 26, 1863.

Endorsed: Filed Aug. 26, 1863.

GEO. C. GORHAM, *Clerk*,
Pr. HYDE, *D. C.*

20 *Order setting argument.*

And afterwards, to wit, on the 29th day of August, A. D. 1863, the following was duly entered of record in said cause, to wit:

At a regular term of the circuit court of the United States of America, in and for the northern district of California, held at the court-house, in the city of San Francisco, on Saturday, the 29th day of August, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The Honorable Stephen J. Field, associate justice of the U. S. Supreme Court.

JAMES E. MUNFORD
vs.
C. OTIS WARDWELL. } At common law.

And now, at this day, come the parties hereto by their respective counsel into court; J. B. Townsend, esq., for plaintiff, and Messrs. E. W. T. Sloan and J. J. Papy for defendant; and by the consent of said counsel it is ordered that the further hearing of this cause be set for Saturday next, the
21 fifth September, 1863. And afterwards, to wit, on the 5th day of September, A. D. 1863, the following special verdict, by stipulation of counsel, was duly entered of record in said cause, to wit:

Special verdict.

In the circuit court of the United States for the northern district of California.

JAMES E. MUNFORD, pl'ff,
vs.
CHAS. O. WARDWELL, def't. } At common law.

And now, on this 26th day of August, A. D. 1863, come the parties aforesaid by their respective attorneys, and thereupon come a jury, to wit: Henry O. Howard, James Wyer, C. F. Webster, Jos. Gordon, John N. Risdon, C. A. Eastman, N. E. Grimes, Wm. A. Palmer, Robert Merrill, Westley Diggins, A. C. Taylor, George Amerage, twelve good and lawful men,
22 who, being duly elected, tried, and sworn, the issues herein joined between said parties well and truly to try, and a true verdict to render according to the evidence, after hearing the evidence of said parties respectively the jurors aforesaid upon their oaths aforesaid do say:

1st. That the lot of ground described in the plaintiff's complaint herein and sued for in the present action, was, at the time of the admission of California into the Union as a State, to wit, on the 9th day of September, A. D. 1850, and thence down to and on the 26th day of March, A. D. 1851, wholly covered with the tide-waters of the bay of San Francisco at all ordinary high tides, and was wholly below the natural high-water mark of said bay.

2nd. That on said 26th day of March, A. D. 1851, the legislature of California passed an act, entitled "An act to provide for the disposition of certain property of the State of California," commonly known as the "San
23 Francisco Water Lot Act," the provisions of which act are as contained in the printed Statute Book of said State for said year 1851, from page 307 to page 310, both inclusive, (which act is hereby referred to and made part hereof without insertion,) and that the lot of ground described in said complaint and sued for in the present action is situated and included within the boundaries mentioned and described in the first section of said act, and is not part of the property known as the "Government Reservation" mentioned in said act.

3d. That on the 25th day of March, A. D. 1856, a judgment was duly rendered by the superior court of the city of San Francisco, a court of competent jurisdiction, in favor of one G. C. Wardwell, against said city for the sum of one thousand and seventy dollars and twenty-five cents, ($1,070 25,) which said judgment was duly recorded, enrolled, and docketed in said court and in said city and county of San Francisco on the 27th day of March, A. D. 1856; and that thereafter, to wit, on the 12th day of January,
24 A. D. 1858, a writ of execution in due form of law was issued upon said judgment, directed to the sheriff of said city and county of San Francisco, commanding him, the said sheriff, to satisfy the said judgment out of the personal property of the said city of San Francisco, or if sufficient could not be found, then out of the real property in said city belonging to said city on the day when the said judgment was docketed in said city and county, or at any time thereafter, which execution was thereafter, to wit, on the same day, duly delivered to and placed in the hands of Charles Doane, esq., then sheriff of said city and county, to be executed, under and by virtue of which writ the said sheriff afterwards duly levied upon said one-hundred vara lot, number one hundred and eighty-six, described in said plaintiff's complaint and sued for in this action, and after due and legal notice and advertisement thereof for sale afterwards, to wit, on the 13th day of February, A. D. 1858, duly sold the same and all the right,
25 title, interest, and claim therein and thereto, which said city of San Francisco had on the day of the docketing of said judgment as aforesaid or at any time thereafter, to one Henry W. Seale, and upon the payment of the purchase-money thereof by him gave to the said Seale a certificate of his said purchase, and duly filed a duplicate thereof in the recorder's office of said city and county of San Francisco; and afterwards, to wit, on the 17th day of October, A. D. 1859, no redemption of said lot from said sale having been made, he, the said sheriff, duly executed and delivered to the said Seale his, the said Doane's, sheriff, deed therefor, which deed was by said sheriff duly acknowledged, so as to entitle the same to be recorded, and was thereafter, to wit, on the 7th day of November, A. D. 1859, duly recorded in said recorder's office.

4th. That by mesne conveyances, since duly executed, acknowledged, and delivered, and duly recorded in said recorder's office, the said plaintiff
26 herein had prior to the 24th day of February, A. D. 1862, acquired, and then and has ever since held and still holds all the estate, right, title, and interest in and to said lot of ground now sued for, which was so acquired as aforesaid by the said Seale under and by virtue of said judgment, execution, sheriff's sale, certificate, and deed.

5th. That the "city of San Francisco" was first incorporated by the legislature of California by the act entitled "An act to incorporate the city of San Francisco," passed April 15th, 1850, and existed as such corporation under and with the powers and capacities conferred by said act until the 15th day of April, 1851, when said city was reincorporated and continued in existence by said legislature by act passed on that day entitled "An act to re-incorporate the city of San Francisco," (both of which acts as contained in the printed Statute Books of said State for said years 1850 and 1851 are hereby referred to and made part hereof without insertion,) and that
27 said one hundred vara lot sued for in the present action is within the corporate limits of said city as fixed by each of said acts.

6th. That from the raising of the American flag in the port of San Francisco, on the 8th day of July, A. D. 1846, until on about the 16th day of September, A. D. 1847, the local or municipal authority at the settlement or town of Yerba Buena, afterwards called San Francisco, was exercised by officers called alcaldes, appointed by the military commandant or elected by the people.

7th. That on the tenth day of March, A. D. 1847, Brigadier General S. W. Kearney, then acting as military governor of California, executed in favor of the city of San Francisco an instrument in writing, purporting to be a grant, in the words and figures following, to wit:

"I, Brigadier General S. W. Kearney, governor of California, by virtue of authority in me vested by the President of the United States of
28 America, do hereby grant, convey, and release unto the town of San Fancisco, the people or corporate authorities thereof, all the right, title, and interest of the government of the United States and of the Territory of California, in and to the beach and water lots on the east front of said town of San Francisco, included between the points known as the Rincon and Fort Montgomery, excepting such lots as may be selected for the use of the general government by the senior officers of the army and navy now there. Provided the said ground hereby ceded shall be divided into lots and sold by public auction to the highest bidders after three months' notice previously given, the proceeds of said sale to be for the benefit of the town of San Francisco.

"Given at Monterey, capital of California, this 10th day of March, 1847, and in the 71st year of the independence of the United States.

"S. W. KEARNEY,
"*Brig. Gen. and Governor of California.*"

8th. That under the title and authority supposed to be conferred
29 by this grant a large number of beach and water lots, each 45 feet 10 inches front by 137½ feet deep, were laid off on the eastern water front of said town, within the limits of said grant, a large portion of which lots after three months' previous notice duly given, were sold by the then alcalde of said town on the 20th, 21st, and 22d days of July, A. D. 1847, a part of the purchase-money thereof being paid down, and a credit being given for the balance.

9th. That on the 13th day of September, A. D. 1847, under the authority of Col. R. B. Mason, then acting as military governor of California, a town council for the town of San Francisco, composed of six members, was elected to serve from the 16th day of September, A. D. 1847, until the end of the year 1848, and on or about said 16th day of September, A. D. 1847, commenced the exercise of public authority as such council.

10th. That on the 2nd day of October, A. D. 1847, one T. M. Leavenworth was appointed by Governor R. B. Mason an alcalde of the said town
30 of San Francisco, and thereafter continued to exercise public authority as such, in said town, until about the 1st of August, A. D. 1849.

11th. That by the discovery of gold in Calfornia, and the excitement consequent thereupon, the aforesaid town council of San Francisco became scattered and dispersed in the early part of the year 1848, and ceased thereafter to exercise any public functions until on or about the 3d day of October, A. D. 1848, when two new members having been elected in the places of two who had resigned, said council again resumed its sessions and its exercise of public authority.

12th. That during this interim of the existence of any town council at San Francisco, the said Leavenworth assumed the authority to grant, and did grant, upon private petition therefor, and without sale at public auction, not only upland lots, but likewise beach and water lots, which had been laid off within the Kearney grant.

31 13th. That at a meeting of said town council held on the 11th day of October, A. D. 1848, a preamble and resolution was adopted by them in the words and figures following, to wit:

Whereas T. M. Leavenworth, the present alcalde, has represented to this body that he has made grants of several parcels of land adjacent to the town, and that the grants made dnring the interim of the council, were for the purpose of raising funds to defray the necessary expenses of the town and district, therefore, resolved, by the council of the town of San Francisco that the grants of land made by T. M. Leavenworth, alcalde of the district of San Francisco, be, and are hereby, ratified and confirmed.

14th. That the term of office of said town council expiring at the end of the year 1848, it ceased thereafter to act, and no regularly organized town council thereafter existed until on or about the 1st of August, A. D. 1849.

15th. That the said T. M. Leavenworth continued to act as alcalde and chief magistrate of said town and district of San Francisco during
32 said interval from the 1st day of January to the 1st day of August, A. D. 1849, and that he during that time, as he had done previously, under color of authority claimed to be derived from said office, and to raise funds for the uses and purposes of said town, executed to several persons grants for lots of ground situated within said town, some of said grants being for upland, and some for water lots within said Kearney grant.

16th. That on or about the 1st day of August, A. D. 1849, an election took place at San Francisco, at which a so called "ayuntamiento," or town council, consisting of eight members, was chosen for said town, and likewise one John W. Geary was elected alcalde thereof, and that thereupon said council and alcalde commenced exercising public authority within said town and district as such officers, and continued so to do until on or about the 3d day of May, A. D. 1850.

17th. That on the 17th day of August, A. D. 1849, said so-called
33 "ayuntamiento," or town council, passed a resolution in the words and figures following, to wit:

Resolved, That the alcalde is hereby prohibited from selling or disposing of any town or public lands, by grant or otherwise, unless under the special ordinance of this council.

18th. And that afterwards, to wit, on the 3d day of October, A. D. 1849, said ayuntamiento, or town council, passed two resolutions, respectively in the words and figures following, to wit:

Resolved, That all the water lots now belonging to the town be sold at public auction, after public notice of the same being given for three months, agreeable to the proclamation of General Kearney.

Resolved, That immediate public notice be given that the grants of all water property heretofore made to any person or persons whatever, by the late alcalde, T. M. Leavenworth, or by any of his predecessors, without three months' notice previous to making such grant, or sale at public auction, as by law required, are illegal, and that the same property will be
34 claimed and held by the town until sold at public auction, agreeable to the conditional grant made by the government to the town.

19th. And that afterwards, to wit, on the 5th day of October, A. D. 1849, said ayuntamiento, or town council, passed two certain other resolutions, respectively in the words and figures following, to wit:

Resolved, That the president of the council be instructed to have a schedule of the unsold water lots made out, and laid before the council at the earliest moment.

Resolved, That the alcalde be requested to advertize, at the earliest possible moment, a public sale at auction of all the unsold water lots.

20th. That such sale of water lots was accordingly immediately advertized by said alcalde to take place on the 3d day of January, A. D. 1850.

21st. And that afterwards, to wit, on the 3d day of November, A. D. 1849, said ayuntamiento, or town council, passed two certain other resolutions, respectively in the words and figures following, to wit:

35 *Resolved*, That the city surveyor be, and hereby is, directed to project, on the official map, the lines of Larkin, Hyde, and Leavenworth streets to their intersection with Market street, and also regularly to lay out on said map the unsurveyed ground lying between Market and Post streets and east of the line of Larkin street; the above-described ground to be divided into lots of fifty varas square each, and properly numbered on the map of the city.

Resolved, That the surveyor be further directed to project the one-hundred-vara lots to the Mission Bay, and back to their junction on Market street with Leavenworth street.

22d. And that afterwards, to wit, on the 5th day of November, A. D. 1849, said ayuntamiento, or town council, passed a resolution in the following words and figures, to wit:

Resolved, That one hundred and eighty of the town lots, of fifty varas each, and twenty of one hundred varas each, as laid down and num-

36 bered on the map of the town recently made under the survey of Wm. M. Eddy, esq., city surveyor, and not heretofore granted or disposed of, shall be sold at public auction on the nineteenth day of November instant, under the the direction of the alcalde, to the highest bidder, the purchasers paying therefor a commission of five per cent. on the amount of the purchase, to be applied towards defraying the expenses attended upon such sale.

23d. And that afterwards, on said 19th day of November, A. D. 1849, said ayuntamiento, or town council, passed a certain other resolution in the words and figures following, to wit:

Resolved, That one hundred and eighty fifty-vara lots, and thirty hundred-vara lots, be sold at public auction on Wednesday, November 28th, A. D. 1849, upon the same conditions as the last sale.

24th. And that afterwards, to wit, on the 22d day of November, A. D. 1849, said ayuntamiento, or town council, passed a resolution in the words

37 and figures following, to wit:

Resolved, That the alcalde lay before the council, as early as practicable, such information as he has in his power to obtain, relative to any claims that may be due the town upon any former sale or grant of water lots; and also, that he inform the council of the number of water lots yet remaining unsold.

25th. And that afterwards, to wit, on the 27th day of November, A. D. 1849, said ayuntamiento, or town council, passed a resolution in the words and figures following, to wit:

Resolved, That the surveyor be directed to procure, at the earliest possible moment, the line of the Mission Dolores property bordering on the town of San Francisco, and to project the survey of the hundred-vara lots, lying south of Market street, to the said line; and also, to get the line of the presidio property, and project the fifty-vara lots to the same, from the Bay thence southerly to Market street.

26th. And that afterwards, to wit, on the first day of December,

38 A. D. 1849, the said ayuntamiento, or town council, of San Francisco, passed a resolution or ordinance in the words and figures following, to wit:

Be it ordained, That two hundred fifty-vara town lots be sold at public auction on Friday, the tenth instant.

27th. And that afterwards, to wit, on the tenth day of December, A. D. 1849, the said John W. Geary, as alcalde of said town, sold at public auction, to one Daniel O'Brien, the lot described in the deed of the said Geary

to the said O'Brien hereinafter set forth; and that on the same day the said Geary executed and delivered to the said O'Brien a deed therefor, in the words and figures following, to wit:

To all persons to whom these presents shall come or concern the town of San Francisco, in the Territory of California, by John W. Geary, first alcalde of San Francisco, greeting:

Whereas the ayuntamiento, or town council, of San Francisco, by virtue of the authority in them vested by resolution passed on the first day
39 of December, in the year of our Lord one thousand eight hundred and forty-nine, ordered and directed that certain town lots should be exposed to public sale, and sold to the highest bidder; and whereas, after due public notice of said sale, the same were exposed to public sale at auction in said town on the tenth day of December in said year, and one of said lots so ordered to be sold numbered, on the map of said town, one hundred and eighty-six, was sold to Daniel O'Brien for the sum of three hundred and five dollars, being the highest price then and there offered for the same:

Therefore, by virtue of the authority in me vested, and in pursuance of the order of the ayuntamiento, or town council, of San Francisco, I, John W. Geary, first alcalde as aforesaid, for and in consideration of three hundred and five dollars to me in hand paid, in trust for said town, before the delivery of these presents, (and the receipt of which is hereby acknowledged,) have granted, bargained, sold, assigned, conveyed, and con-
40 firmed, and by these presents do grant, bargain, sell, assign, convey, and confirm, unto the said Daniel O'Brien, his heirs and assigns forever, the said hundred-vara lot, numbered one hundred and eighty-six, situated in said town, on the bay of San Francisco, bounded on the northwest by lot one hundred and eighty, on east by lot one hundred and seventy, and on the south by said bay, being a fractional lot, together with all and singular the advantages and profits whatsoever in and to the same belonging or in any manner appertaining; and also the estate, right, title, interest, property, claim, and demand whatsoever of the said town of San Francisco in and to any and every part thereof. To have and to hold all and singular the above-described lot of ground as fully as the same was held and possessed by the said town of San Francisco as aforesaid, unto the said Daniel O'Brien, his heirs and assigns, to the only proper use and behoof of the said Daniel O'Brien, his heirs and assigns forever.

41 In testimony whereof, I, the said John W. Geary, first alcalde as aforesaid, have hereunto set my hand and official seal this tenth day of December, in the year of our Lord one thousand eight hundred and forty-nine.

[L. S.] JNO. W. GEARY,
First Alcalde of San Francisco.

Signed, sealed, and delivered in presence of—

J. HERON FOSTER,
H. L. DODGE.

28th. That on the twenty-fourth day of December, A. D. 1849, said ayuntamiento, or town council, of San Francisco, adopted a preamble and resolution in the words and figures following, to wit:

Whereas it being evident that the late alcalde, Mr. Leavenworth, having illegally and injuriously, to this town, granted lots without the proper authority: Therefore—

Resolved, That the said Mr. Leavenworth be proceeded against according to law, and he be required to give bonds to the amount to ——— dollars, to indemnify the town against any loss that may arise from such illegal

grants, and that our attorney be instructed to so prosecute, and without delay.

29th. And that afterwards, to wit, on the same day, said ayuntamiento, or town council, passed the following resolution, to wit:

42 *Resolved*, That purchasers of water lots, on the third of January be required to pay one quarter in advance, one quarter in three months, one quarter in six months, and one quarter in nine months.

30th. And that afterwards, to wit, on said 3d day of January, A. D. 1850, said sale of water lots took place as advertised.

31st. And that afterwards, to wit, on the 7th day of January, A. D. 1850, said ayuntamiento, or town council, passed a resolution or ordinance in the words and figures following, to wit:

Be it ordained, That the alcalde or president of the town council be, and is hereby, authorized to notify all persons who have purchased town lots at any of the former sales by auction be required to come forward and pay up the balance due and take out their deed within ten days, and all persons purchasing water lots at the sale on the 3d of January be required to take out their deeds within twenty days or forfeit all right to the same.

43 32nd. And that afterwards, to wit, on the 30th day of January, A. D. 1850, a communication was received by said ayuntamiento, or town council, from said T. M. Leavenworth, with the account of the said Leavenworth of his receipt and disbursement of municipal funds whilst acting as alcalde of said town and district as aforesaid, which communication and account was thereupon referred to the committee on finance of said ayuntamiento, together with said Alcalde Geary.

33d. That thereafter, to wit, on the 18th day of March, A. D. 1850, said ayuntamiento or town council passed a resolution in the words and figures following, to wit:

Resolved, That the town council regard all titles to land made by grants or sales in any form within the jurisdiction of San Francisco, by any person or persons whatever other than the legally elected alcaldes and town council thereof as illegal and of no effect.

34th. That on the same day, to wit, said 18th day of March, A. D.

44 1850, the said committee, to whom were referred the accounts of the said T. M. Leavenworth, reported a balance due the said Leavenworth from the said town of San Francisco of five thousand two hundred and seventy-four dollars and eighty-seven cents, ($5,274 87,) which was thereupon ordered to be paid as soon as there should be a surplus of funds in the treasury of said town.

35th. That afterwards, to wit, on the first day of April, A. D. 1850, the following preamble, resolution, and report were adopted by said ayuntamiento or town council, to wit:

Whereas there was no organized town council for the town and district of San Francisco from the first of January to the first of August, 1849, to provide by legislation the ways and means for the necessary improvement of the town and expenses of the municipality thereof, thereby throwing the entire weight and responsibility upon the alcalde and chief magistrate for the raising and providing the funds necessary for the purposes, and for the maintenance of the proper authority of the said town, and which

45 in consequence could only be effected by a resort to the sale by grant, in the usual form, of a portion of the public domain of the said town and district: Therefore—

Resolved, That the town council do hereby approve, confirm, and ratify all grants of lands made within the jurisdiction of the town and district of San Francisco by the alcalde and chief magistrate to raise the necessary

funds for the purposes aforesaid during his term of office, provided such grants shall appear upon the records in the archives of the town and district of San Francisco.

The committee to whom the foregoing preamble and resolution was referred would respectfully report that they can see no objection to the passage of said resolution, but believe that public policy and the interests of the city require that something should be done by this council in relation thereto. The uncertainty in which many of the titles are involved has had the effect of late to prevent capitalists from investing money in real
46 estate in this city, and forced many to invest in other places. No declaration of the right of the city to the property which it claims can be to explicit, and if lots have heretofore been disposed of by alcaldes without the approval of the council, provided the same was done in good faith and for public benefit, your committee consider it but an act of justice for the council to sanction and approve the same.

36th. That on the same day, to wit, said 1st day of April, A. D. 1850, the following other resolution was passed by said ayuntamiento or town council, to wit:

Resolved, That in the opinion of this council the only competent authority to dispose of the town property, by grant or otherwise, is vested in the legally elected alcalde and town council, and that all grants or sales made by other authorities are illegal and void.

37th. That all the deeds or grants made by J. W. Geary, alcalde of San Francisco during his term of office consisted of printed blanks on
47 one sheet of paper filled up at the time they were issued, and copies thereof, consisting of similar blanks, filled up in like manner by his clerk, were retained in the office of the alcalde. The copies were folded up, the name of the purchaser and number of the lot and designation of the class to which it belonged—that is to say, whether 100-vara, 50-vara or water lot—being endorsed thereon, and those of each distinct class were kept in said alcalde's office in a separate bundle, but these several copies were not bound or fastened together in any manner. In that state they passed into the office of the county recorder on its organization in 1850, where they continued to remain in the same state until 1856, when they were bound up in the form of books, each class forming a separate volume. The grant to O'Brien aforesaid was filled up in manner above state, and a copy thereof, also made as above stated, was kept in like manner in the bundle composed of copies of grants of 100-vara lots, and so continued until the time it, with the other copies, was bound up as aforesaid in 1856. There
48 was no record or registry of said grant to O'Brien or of any other of said grants, at any time except as above stated.

38th. That by mesne conveyances, since duly executed, acknowledged, and delivered, and duly recorded in said recorder's office, the said defendant herein had, prior to the commencement of this action, acquired and then held and still holds all the estate, right, title, and interest in and to said lot of ground, now sued for, which was acquired by the said Daniel O'Brien, under and by virtue of the instrument of writing executed to him by the said Geary, as aforesaid, and under and by virtue of said act of the legislature of California, passed March 26, 1851, commonly known as the "San Francisco Water Lot Act."

39th. That said defendant, Charles O. Wardwell, was in the possession of said lot of ground now sued for, at the commencement of this action, holding the same adversely to said plaintiff, and has been so in actual possession of said lot ever since said 25th day of July, 1859.

And the jurors aforesaid, upon their oaths aforesaid, do further say

49 that they find a general verdict for the plaintiff, subject to the opinion of the court upon the foregoing recited facts.

The above is agreed to as a special verdict in this cause.

JAS. B. TOWNSEND, *Att'y for Pl'ff.*
J. J. PAPY, *Att'y for Def't.*

Endorsed: Filed Sept. 5, 1863.

G. C. GORHAM, *Clerk.*

50 And afterwards, to wit, on the 5th day of September, A. D. 1863, the following was duly entered of record in said cause, to wit:

Proceedings in court on argument.

At a regular term of the circuit court of the United States of America, in and for the northern district of California, held at the court-house, in the city of San Francisco, on Saturday, the 5th day of September, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The Honorable Stephen J. Field, associate justice of the U. S. Supreme Court.

JAMES E. MUNFORD
vs.
C. OTIS WARDWELL. } At common law.

And now at this day come the parties hereto by their respective counsel, into court, J. B. Townsend, esq., for *for* plaintiff, and Messrs. E. W. F. Sloan and J. J. Papy for defendant, and this cause was duly argued to the court, and submitted upon the verdict heretofore rendered herein.

51 And afterwards, to wit, on the 23d day of October, A. D. 1863, the following was duly rendered of record in said cause, to wit:

Order for judgment.

At a regular term of the circuit court of the United States of America, in and for the northern district of California, held at the court-house in the city of San Francisco, on Friday, the 23d day of October, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The Honorable Ogden Hoffman, U. S. district judge.

JAMES E. MUNFORD
vs.
C. OTIS WARDWELL. } At common law.

And now at this day, this cause having heretofore been duly argued and submitted to the court on the special verdict of the jury found herein
52 and due deliberation had in the premises, it is ordered that judgment be entered herein for the defendant.

Endorsed: Filed this 23d day of October, 1863.

GEO. C. GORHAM, *Clerk,*
p. HYDE, *D. C.*

53 And on the same day, to wit, the 23rd day of October, in the year A. D. one thousand eight hundred and sixty-three, judgment was entered in said cause in words, terms, and figures as follows, to wit:

Judgment.

In the circuit court of the United States for the northern district of California.

JAMES E. MUNFORD, Pl'ff,
vs.
CHAS. O. WARDWELL, Def't. } At common law, June term, 1863.

And now on this 26th day of August, A. D. 1863, came the parties aforesaid by their respective attorneys, and thereupon came a jury, to wit: Henry O. Howard, James Myer, C. F. Webster, James Gordon, John N. Risdon, C. O. Eastman, N. E. Grimes, Wm. A. Palmer, Robert Merrill, Wesley Diggins, A. C. Taylor, George Amerage, twelve good and lawful men, who being duly elected, tried, and sworn the issues herein joined between said
54 parties well and truly to try, and a true verdict to render according to the evidence, after hearing the evidence of said parties, respectively, the jurors aforesaid, upon their oaths aforesaid, do say:

1st. That the lot of ground described in the plaintiff's complaint herein, and sued for in the present action, was at the time of the admission of California into the Union as a State, to wit: on the 9th day of September, A. D. 1850, and thence down to and on the 26th day of March, A. D. 1851, wholly covered with the tide-waters of the bay of San Francisco at all ordinary high tides, and was wholly below the natural high-water mark of said bay.

2nd. That on said 26th day March, A. D. 1851, the legislature of California passed an act, entitled "An act to provide for the disposition of certain property of the State of California," commonly known as the "San Francisco Water Lot Act," the provisions of which act are as contained in the printed Statute Book of said State of said year 1851, from page 307
55 to page 310, both inclusive, (which act is hereby referred to and made part hereof without insertion,) and that the lot of ground described in said complaint, and sued for in the present action, is situated and included within the boundaries mentioned and described in the first section of said act, and is not part of the property known as the "Government Reservation," mentioned in said act.

3rd. That on the 25th day of March, A. D. 1856, a judgment was duly rendered by the superior court of the city of San Francisco, a court of competent jurisdiction, in favor of one G. C. Wardwell against said city for the sum of one thousand and seventy dollars and twenty-five cents, ($1,070 25,) which said judgment was duly recorded, enrolled, and docketed in said court, and in said city and county of San Francisco, on the 27th day of March, A. D. 1856; and that thereafter, to wit: on the 12th day of January, A. D. 1858, a writ of execution in due form of law was issued upon
56 said judgment directed, to the sheriff of said city and county of San Francisco, commanding him, the said sheriff, to satisfy the said judgment out of the personal property of the said city of San Francisco, or if sufficient could not be found, then out of the real property in said city belonging to said city on the day when the said judgment was docketed in said city and county, or at any time thereafter, which execution was thereafter, to wit: on the same day, duly delivered to and placed in the hands of Charles Doane, esq., then sheriff of said city and county, to be executed, under and by virtue of which writ the said sheriff afterwards duly levied upon said one-hundred-vara lot, number one hundred and eighty-six, described in said plaintiff's complaint, and sued for in this action, and after due and legal notice and advertisement thereof for sale afterwards, to wit: on the 13th day of February, A. D. 1858, duly sold the same, and all the right, title, in-

terest, and claim therein and thereto which said city of San Fran-
57 cisco had on the day of the docketing of said judgment as aforesaid, or at any time thereafter, to one Henry W. Seale, and upon the payment of the purchase-money thereof by him, gave to the said Seale a certificate of his purchase, and duly filed a duplicate thereof in the recorder's office of said city and county of San Francisco; and afterwards, to wit: on the 17th day of October, A. D. 1859, no redemption of said lot from said sale having been made, he, the said sheriff, duly executed and delivered to the said Seale his, the said Doane's, sheriff's deed therefor, which deed was by said sheriff duly acknowledged so as to entitle the same to be recorded, and was thereafter, to wit: on the 7th day of November, A. D. 1859, duly recorded in said recorder's office.

4th. That by mesne conveyances since duly executed, acknowledged, and delivered, and duly recorded in said recorder's office, the said plaintiff herein had, prior to the 24th day of February, A. D. 1862, acquired and
58 then and has ever since held, and still holds, all the estate, right, title, and interest in and to said lot of ground now sued for, which was so acquired as aforesaid by the said Seale under and by virtue of said judgment, execution, sheriff's sale, certificate, and deed.

5th. That the city of San Francisco was first incorporated by the legislature of California by the act entitled "An act to incorporate the city of San Francisco," passed April 15, 1850, and existed as such incorporation under and with the powers and capacities conferred by said act until the 15th day of April, 1851, when said city was incorporated and continued in existence by said legislature by act passed on that day, entitled "An act to reincorporate the city of San Francisco," (both of which acts, as contained in the printed Statute Books of said State for said year 1850 and 1851 are hereby referred to and made part hereof without insertion,) and that said one-hundred-vara lot, sued for in the present action, is within the cor-
59 porate limits of said city as fixed by each of said acts.

6th. That from the raising of the American flag in the port of San Francisco, on the 8th day of July, A. D. 1846, until on or about the 16th day of September, A. D. 1847, the local or municipal authority at the settlement or town of Yerba Buena, afterwards called San Francisco, was exercised by officers, called alcaldes, appointed by the military commandant or elected by the people.

7th. That on the tenth day of March, A. D. 1847, Brigadier General S. W. Kearney, then acting as military governor of California, executed in favor of the city of San Francisco an instrument in writing, purporting to be a grant, in the words and figures following, to wit:

"I, Brigadier General S. W. Kearney, governor of California by virtue of authority in me vested by the President of the United States of Amer-
60 ica, do hereby grant, convey, and release unto the town of San Francisco, the people or corporate authorities thereof, all the right, title, and interest of the government of the United States, and of the Territory of California, in and to the beach and water lots on the east front of said town of San Francisco, included between the points known as the Rincon and and Fort Montgomery, excepting such lots as may be selected for the use of the general government by the senior officers of the army and navy now there, provided the said ground hereby ceded shall be divided into lots and sold by public auction to the highest bidders, after three months' notice previously given, the proceeds of said sale to be for the benefit of the town of San Francisco.

"Given at Monterey, capital of California, this 10th day of March, 1847, and the 71st year of the independence of the United States.

"S. W. KEARNEY,

"Brig. Gen. and Governor of California."

61 8th. That under the title and authority supposed to be conferred by this grant a large number beach and water lots, each 45 feet 10 inches front by 137½ feet deep, were laid off on the eastern water front of said town, within the limits of said grant, a large portion of which lots, after three months' previous notice duly given, were sold by the then alcalde of said town, on the 20th, 21st, and 22d days of July, A. D. 1847, a part of the purchase-money thereof being paid down and a credit given for the balance.

9th. That on the 13th day of September, A. D. 1847, under the authority of Col. R. B. Mason, then acting as military governor of California, a town council for the town of San Francisco, composed of six members, was elected to serve from the 16th day of September, A. D. 1847, until the end of the year 1848; and, on or about said 16th day of September, commenced the exercise of public authority as such council.

62 10th. That on the 2d day of October, A. D. 1847, one T. M. Leavenworth was appointed by Governor R. B. Mason an alcalde of the said town of San Francisco, and thereafter continued to exercise public authority as such in said town until about the 1st of August, A. D. 1849.

11th. That by the discovery of gold in California, and the excitement consequent thereupon, the aforesaid town council of San Francisco became scattered and dispersed in the early part of the year 1848 and ceased thereafter to exercise any public functions until on or about the 3d day of October, A. D. 1848, when two new members having been elected in the place of two who had resigned, said council again resumed its sessions and the exercise of public authority.

12th. That during the interim of the existence of any town council at San Francisco the said Leavenworth assumed the authority to grant, and
63 did grant upon private petition therefor, and without sale at public auction, not only upland lots but likewise beach and water lots which has been laid off within the Kearney grant.

13th. That at a meeting of said town council, held on the 11th day of October, A. D. 1849, a preamble and resolution was adopted by them in the words and figures following, to wit:

Whereas T. M. Leavenworth, the present alcalde, has represented to this body that he has made grants of several parcels of land adjacent to the town, and that the grants made during the interim of the council were for the purpose of raising funds to defray the necessary expenses of the town and district: Therefore—

Resolved by the council of the town of San Francisco, That the grants of land made by T. M. Leavenworth, alcalde of the district of San Francisco, be, and are hereby, ratified and confirmed.

14th. That the term of office of said town council expiring at the end of the year 1848, it ceased thereafter to act, and no regularly organ-
64 ized town council thereafter existed until on or about the 1st of August, A. D. 1849.

15th. That the said T. M. Leavenworth continued to act as alcalde and chief magistrate of said town and district of San Francisco during an interval from the 1st day of January to the first day of August, A. D. 1849, and that he during that time, as he had done previoualy under color of authority, claimed to be derived from said office, and to raise funds for the uses and purposes of said town, executed to several persons grants for lots of ground situated within said town, some of said grants being for upland, and some for water lots, within said Kearney grant.

16th. That on or about the 1st day of August, A.D. 1849, an election took place at San Francisco, at which a so-called "ayuntamiento," or town council, consisting of eight members, was chosen for said town; and like-

65 wise one John W. Geary was elected alcalde thereof; and that thereupon said council and alcalde commenced exercising public authority within said town and district as such officers, and continued so to do until on or about the 3d day of May, A. D. 1850.

17th. That on the 17th day of August, A. D. 1849, said so-called "ayuntamiento," or town council, passed a resolution in the words and figures following, to wit:

Resolved, That the alcalde is hereby prohibited from selling or disposing of any town or public lands, by grant or otherwise, unless under the special ordinance of this council.

18th. And that afterwards, to wit: On the 3d day of October, A. D. 1849, said ayuntamiento, or town council, passed two resolutions, respectively in the words and figures following, to wit:

Resolved, That all the water lots now belonging to the town be sold at public auction after public notice of the same being given for three
66 months, agreeable to the proclamation of General Kearney.

Resolved, That immediate public notice be given that the grants of all water property heretofore made to any person or persons whatever, by the late alcalde, T. M. Leavenworth, or by any of his predecessors, without three months' notice previous to making such grant or sale at public auction, as by law required, are illegal, and that the same property will be claimed and held by the town until sold at public auction, agreeable to the conditional grant made by the government to the town.

19th. And that afterwards, to wit, on the 5th day of October, A. D. 1849, said ayuntamiento, or town council, passed two certain other resolutions, respebtively in the words and figures following, to wit:

Resolved, That the president of the council be instructed to have a schedule of the unsold water lots made out and laid before the council at the earliest moment.

Resolved, That the alcalde be requested to advertize at the earli-
67 est possible moment, a public sale at auction of all the unsold water lots.

20th. That such sale of water lots was accordingly immediately advertized by said alcalde, to take place on the 3d day of January, A. D. 1850.

21st, And that afterwards, to wit, on the 3d day of November, A. D. 1849, said ayuntamiento, or town council, passed two certain other resolutions, respectively in the words and figures following, to wit:

Resolved, That the city surveyor be, and hereby is, directed to project on the official map the lines of Larkin, Hyde, and Leavenworth streets to their intersection with Market street, and also regularly to lay out on said map the unsurveyed ground lying between Market and Post streets and east of the line of Larkin street, the above-described ground to be divided into lots of fifty varas square each, and property numbered on the map of the
68 city.

Resolved, That the surveyor be further directed to project the one-hundred-vara lots to the Mission Bay and back to the junction on Market street and Leavenworth street.

22nd. And that afterwards, to wit, on the 5th day of November, A. D. 1849, said ayuntamiento, or town council, passed a resolution in the following words and figures, to wit:

Resolved, That one hundred and eighty of the town lots, of fifty varas each, as laid down and numbered on the map of the town, recently made under the survey of Wm. M. Eddy, esq're, city surveyor, and not heretofore granted or disposed of, shall be sold at public auction, on the nineteenth day of November instant, under the direction of the alcalde, to the highest bidder, the purchasers paying therefor a commission of five per cent. on the

amount of the purchase, to be applied towards defraying the expenses attended upon such sale.

69 And that afterwards, on said 19th day of November, A. D. 1849, said ayuntamiento, or town council, passed a certain other resolution in the words and figures following, to wit:

Resolved, That one hundred and eighty fifty-vara lots and thirty hundred-vara lots be sold at public auction on Wednesday, November 28th, A. D. 1849, upon the same conditions as the last sale.

24th. And that afterwards, to wit, on the 22d day of November, A. D. 1849, said ayuntamiento, or town council, passed a resolution in the words and figures following, to wit:

Resolved, That the alcalde lay before the council as early as practicable such information as he has in his power to obtain relative to any claims that may be due the town upon any former sale or grant of water lots; and also that he inform the council of the number of water lots yet remaining unsold.

70 25th. And that afterwards, to wit, on the 27th day of November, A. D. 1849, said ayuntamiento, or town council, passed a resolution in the words and figures following, to wit:

Resolved. That the surveyor be directed to procure at the earliest possible moment the line of the Mission Dolores property, bordering on the town of San Francisco, and to project the survey of the hundred-vara lots lying south of Market street to the said line; and also to get the line of the presidio property and project the fifty-vara lots to the same from the bay, thence southerly to Market street.

26th. And that afterwards, to wit, on the first day of December, A. D. 1849, the said ayuntamiento, or town council, of San Francisco passed a resolution or ordinance in the words and figures following, to wit:

Be it ordained, That two hundred fifty-vara town lots be sold at public auction on Friday, the tenth instant.

71 27th. And that afterwards, to wit, on the tenth day of December, A. D. 1849, the said John W. Geary, as alcalde of said town, sold at public auction to one Daniel O'Brien the lot described in the deed of the said Geary to the said O'Brien, hereinafter set forth; and that on the same day the said Geary executed and delivered to the said O'Brien a deed therefor in the words and figures following, to wit:

To all persons to whom these presents shall come or concern the town of San Francisco, in the Territory of California, by John W. Geary, first alcalde of San Francisco, greeting:

Whereas the ayuntamiento, or town council, of San Francisco, by virtue of the authority in them vested by resolution passed on the first day of December, in the year of our Lord one thousand eight hundred and forty-nine, ordered and directed that certain town lots should be exposed to public sale and sold to the highest bidder; and whereas, after due public notice
72 of said sale, the same were exposed to public sale at auction in said town on the tenth day of December in said year, and one of said lots, so ordered to be sold, numbered on the map of said town one hundred and eighty-six, was sold to Daniel O'Brien for the sum of three hundred and five dollars, being the highest price then and there offered for the same:

Therefore, by virtue of the authority in me vested, and in pursuance of the order of the ayuntamiento, or town council, of San Francisco, I, John W. Geary, first alcalde as aforesaid, for and in consideration of three hundred and five dollars to me in hand paid, in trust for said town, before the delivery of these presents, (and the receipt of which is hereby acknowledged,) have granted, bargained, sold, assigned, conveyed, and confirmed,

and by these presents do grant, bargain, sell, assign, convey, and confirm, unto the said Daniel O'Brien, his heirs and assigns forever, the said hundred-vara lot, numbered one hundred and eighty-six, situate in said town,
73 on the bay of San Francisco, bounded on the northwest by lot one hundred and eighty, on east by lot one hundred and seventy, and on the south by said bay, being a fractional lot; together with all and singular the advantages and profits whatsoever in and to the same belonging or in any manner appertaining, and also all the estate, right, title, interest, property, claim, and demand whatsoever of the said town of San Francisco in and to any and every part thereof. To have and to hold all and singular the above-described lot of ground as fully as the same was held and possessed by the said town of San Francisco as aforesaid, unto the said Daniel O'Brien, his heirs and assigns, to the only proper use and behoof of the said Daniel O'Brien, his heirs and assigns forever.

In testimony whereof, I, the said John W. Geary, first alcalde as aforesaid, have hereunto set my hand and official seal this tenth day of December, in the year of our Lord one thousand eight hundred and forty-
74 nine.

[L. S.] JNO. W. GEARY,
First Alcalde of San Francisco.

Signed, sealed, and delivered in presence of—
J. HERON FOSTER.
H. L. DODGE.

28th. That on the 24th day of December, A. D. 1849, said ayuntamiento or town council of San Francisco adopted a preamble and resolution in the words and figures following, to wit:

Whereas it being evident that the late alcalde, Mr. Leavenworth, having illegally and injuriously to the town granted lots without the proper authority, therefore—

Resolved, That the said Mr. Leavenworth be proceeded against according to law and he be required to give bonds to the amount of ——— dollars to indemnify the town against any loss that may arise from such illegal grants, and that our attorney be instructed to so prosecute, and without delay.

75 29th. And that afterwards, to wit, on the same day, said ayuntamiento, or town council, passed the following resolution, to wit:

Resolved, That purchasers of water lots on the third of January be required to pay one quarter in advance, one quarter in three months, one quarter in six months, and one quarter in nine months.

30th. And afterwards, to wit, on said 3d day of January, A. D. 1850, said sale of water lots took place as advertised.

31st. And that afterwards, to wit, on the 7th day of January, A. D. 1850, said ayuntamiento, or town council, passed a resolution or ordinance in the words and figures following, to wit:

Be it ordained, That the alcalde or president of the town council be, and is hereby, authorized to notify all persons who have purchased town lots at any of the former sales by auction be required to come forward and pay up the balance due and take out their deeds within ten days; and all persons
76 purchasing water lots at the sale on the 3d of January be required to take out their deeds within twenty days or forfeit all right to the same.

32d. And that afterwards, to wit, on the 30th day of January, A. D. 1850, a communication was received by said ayuntamiento, or town council, from said T. M. Leavenworth, with the account of the said Leavenworth of his receipt and disbursement of municipal funds whilst acting as alcalde of said

town and district as aforesaid, which communication and account was thereupon referred to the committee on finance of said ayuntamiento, together with said Alcalde Geary.

33d. That thereafter, to wit, on the 18th day of March, A. D. 1850, said ayuntamiento, or town council, passed a resolution in the words and figures following, to wit:

77 *Resolved*, That the town council regard all titles to land made by grants or sales, in any form, within the jurisdiction of San Francisco, by any person or persons whatever other than the legally elected alcaldes and town council thereof, as illegal and of no effect.

34th. That on the same day, to wit, said 18th day of March, A. D. 1850, the said committee, to whom were referred the accounts of the said T. M. Leavenworth, reported a balance due the said Leavenworth, from the said town of San Francisco, of five thousand two hundred and seventy-four dollars and eighty-seven cents, ($5,274 87,) which was thereupon ordered to be paid as soon as there should be a surplus of funds in the treasury of said town.

35th. That afterwards, to wit, on the first day of April, A. D. 1850, the following preamble, resolution, and report were adopted by said ayuntamiento, or town council, to wit:

78 Whereas there was no organized town council for the town and district of San Francisco from the first of January to the first of August, 1849, to provide by legislation the ways and means for the necessary improvement of the town, and expenses of the municipality thereof, thereby throwing the entire weight and responsibility upon the alcalde and chief magistrate for the raising and providing the funds necessary for the purposes and for the maintenance of the proper authority of the said town, and which, in consequence, could only be effected by a resort to the sale by grant, in the usual form, of a portion of the public domain of the said town and district: Therefore—

Resolved, That the town council do hereby approve, confirm, and ratify all grants of lands made within the jurisdiction of the town and district of San Francisco, by the alcalde and chief magistrate thereof, to raise the necessary funds for the purposes aforesaid, during his term of office, provided such grants shall appear upon the records in the archives of the town and district of San Francisco.

79 The committee, to whom the foregoing preamble and resolution was referred, would respectfully report that they can see no objection to the passage of said resolution, but believe that public policy and the interests of the city require that something should be done by this council in relation thereto. The uncertainty in which many of the titles are involved has had the effect of late to prevent capitalists from investing money in real estate in this city, and forced many to invest in other places. No declaration of the right of the city to the property which it claims can be to explicit, and if lots have heretofore been disposed of by alcaldes without the approval of the council, provided the same was done in good faith and for public benefit, your committee consider it but an act of justice for the council to sanction and approve the same.

36th. That on the same day, to wit, said 1st day of April, A. D. 1850, the following other resolution was passed by said ayuntamiento, or town council, to wit:

80 *Resolved*, That, in the opinion of this council, the only competent authority to dispose of the town property, by grant or otherwise, is vested in the legally elected alcalde and town council, and that all grants or sales made by other authorities are illegal and void.

37th. That all the deeds or grants made by J. W. Geary, alcalde of San Francisco, during his term of office, consisted of printed blanks on one sheet

of paper, filled up at the time they were issued, and copies thereof, consisting of similar blanks, filled up in like manner by his clerk, were retained in the office of the alcalde. These copies were folded up, the name of the purchaser and number of the lot and designation of the class to which it belonged—that is to say, whether 100-vara, 50-vara, or water lot—being endorsed thereon, and those of each distinct class were kept in said alcalde's office in a separate bundle; but these several copies were not bound or fastened together in any manner. In that state they passed into the office
81 of the county recorder on its organization in 1850, where they continued to remain until 1856, when they were bound up in the form of books, each class forming a separate volume. The grant to O'Brien aforesaid was filled up in manner above stated, and a copy thereof, also made as above stated, was kept in like manner in the bundle composed of copies of grants of one-hundred-vara lots, and so continued until the time it with the other copies was bound up as aforesaid, in 1856. There was no record or registry of said grant to O'Brien, or of any other of said grants at any time, except as above stated.

38th. That by mesne conveyances since duly executed, acknowledged, and delivered, and duly recorded in said recorder's office, the said defendant herein had, prior to the commencement of this action, acquired and then held and still holds all the estate, right, title, and interest in and to said lot of ground, now sued for, which was acquired by the said Daniel O'Brien
82 under and by virtue of the instrument of writing executed to him by the said Geary as aforesaid, and under and by virtue of said act of the legislature of California, passed March 26, 1851, commonly known as the "San Francisco Water Lot Act."

39th. That said defendant, Charles O. Wardwell, was in the possession of said lot of ground now sued for, at the commencement of this action, holding the same adversely to said plaintiff; and has been so in actual possession of said lot ever since said 25th day of July, 1859.

And the jurors aforesaid, upon their oaths aforesaid, do furthhr say that they find a general verdict for the plaintiff, subject to the opinion of the court upon the foregoing recited facts.

The above is agreed to as a special verdict in this cause.

JAMES B. TOWNSEND, *Att'y for Pl'ff.*

83 J. J. PAPY, *Att'y for Def't.*

And the court wishing to be further advised toucing the judgment of law upon the special verdict aforesaid, whereupon a day was given until October 23d, 1863.

And now, on this 23 day of October, 1863, come the parties aforesaid, by their respective attorneys aforesaid, and the court being fully advised in the premises, orders judgment to be entered in favor of the defendant, Wardwell.

Whereupon, it is considered that the plaintiff take nothing by his action aforesaid; that the defendant go thereof without day, and that he also recover of the plaintiff, James E. Munford, the sum of sixty-five 95-100 dollars, being his costs in this behalf expended.

84 Dated at San Francisco this 23d day of October, A. D. 1863.

Endorsed: Judgment. Filed October 23d, 1863.

GEO. C. GORHAM, *Clerk,*
Pr. HYDE, *D. C.*

85 And afterwards, to wit, on the 28th day of March, in the year of our Lord one thousand eight hundred and sixty-four, upon the prayer of the above-named plaintiff, the following writ of error was duly issued in this cause, in the words following, to wit:

86 *Writ of error.*

The President of the United States of America to the judges of the circuit court of the United States for the northern district of California, greeting:

Because in the record and proceedings, as also in the rendition of a judgment on the 23rd day of October, in the year of our Lord one thousand eight hundred and sixty-three, in a plea lately pending before you, between James E. Munford, plaintiff, and C. Otis Wardwell, defendant, and wherein said judgment was rendered against said plaintiff, James E. Munford, manifest error hath happened to the great damage of said last-named plaintiff therein, as by his complain appears, and it being fit that the error, if any there have been, should be duly corrected and full and speedy justice done to the party last aforesaid in this behalf, you are hereby commanded that if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all
87 thing concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Hon. Roger B. Taney, chief justice of the said Supreme Court, this 28th day of March, A. D. 1864, and of the independence of the United States the eighty-eighth year.

In testimony whereof, the clerk of the said circuit court hath hereunto subscribed his name and affixed the seal of the said United States circuit court this 28th day of March, A. D. 1864.

[SEAL.]

HENRY C. HYDE,
Clerk U. S. Cir. Court, North. Dist. Cal'a.

88 Allowed March 28th, 1864.

OGDEN HOFFMAN, *Dist. Judge.*

To the justices of the Supreme Court of the United States of America:

The return of the foregoing writ of error appears by the transcript of the record and proceedings in the cause mentioned therein, which is hereto annexed.

The answer of the judges of the circuit court of the United States for the northern district of California.

Witness my hand and the seal of said circuit court this 20th day of April, A. D. 1864.

[SEAL.]

HENRY C. HYDE,
Clerk U. S. Cir. Ct. North. Dist. Cal.

90 And afterwards, to wit, on the same day and in the year last aforesaid, the following citation upon the aforesaid writ of error was duly issued by the judge of said court in the words following, that is to say:

91 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To C. Otis Wardwell, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court

of the United States for the northern district of California, wherein James E. Munford is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this 28th day of March, A. D. 1864.

OGDEN HOFFMAN,
U. S. District Judge, North Dist. Cal'a, and Associate Justice of the U. S. circuit court for said district.

92 NORTHERN DISTRICT OF CALIFORNIA,
City and County of San Francisco, ss:

Paul Newmann, of lawful age, being by the undersigned duly sworn, on his oath, deposes and says that he served the foregoing citation on J. J. Papy, esq., the attorney of record of Charles Otis Wardwell, the defendant in error therein named, by delivering to and leaving with the said Papy a true copy of said citation, and showing him the original thereof, in the said city and county of San Francisco, on this thirtieth day of March, A. D. 1864.

PAUL NEWMANN.

Subscribed and sworn to before me this 30th day of March, A. D. 1864.
HENRY C. HYDE, *U. S. Com'r.*

93 NORTHERN DISTRICT OF CALIFORNIA,
City and County of San Francisco, ss:

Paul Newmann, of lawful age, being by the undersigned duly sworn, on his oath, deposes and says that he served the foregoing citation on Charles Otis Wardwell, the defendant in error therein named, by showing him the original, and offering him a copy thereof personally, in said city and county of San Francisco, on this thirty-first day of March, A. D. 1864, and that the said Wardwell refused to take or receive said copy.

PAUL NEWMANN.

Sworn to and subscribed on this 31st day of March, A. D. 1864, before me.
HENRY C. HYDE,
U. S. Com'r, North'n Dist. Cal'a.

94 Filed M'ch 31st, 1864.

HENRY C. HYDE, *Clerk.*

95 And afterwards, to wit, on the same day and in the year last aforesaid, a bond was duly filed by said plaintiff in error, in the words and figures following, to wit:

Bond.

In the circuit court of the United States, northern district of California.

JAMES E. MUNFORD, plaintiff in error.
vs.
CHARLES O. WARDWELL, defendant in error. } At common law.

Know all men by these presents that we Roswell P. Clement and Solomon A. Sharp, both of the city and county of San Francisco, State of California, are held and firmly bound unto the above-named Charles O. Wardwell, defendant in error, in the just and full sum of two hundred and fifty dollars, lawful

money of the United States, to be paid to him, his heirs, executors, ad-
96 ministrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this twenty-eighth day of March, A. D. 1864.

The condition of this obligation is such that, whereas the above-named James E. Munford has sued out a writ of error from the Supreme Court of the United States to said circuit court, to reverse the judgment rendered by said circuit court in the above-entitled action, in favor of said defendant in error:

Now, if the said James E. Munford shall prosecute his said writ of error with effect, and shall answer all damages and costs which shall be adjudged against him if he fail to make his said plea good, then this obligation shall be void; otherwise, to remain in force.

R. P. CLEMENT. [SEAL.]
SOL. A. SHARP. [SEAL.]

Executed and delivered in presence of.—
HENRY C. HYDE, *U. S. Com'r.*

97 NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Roswell P. Clement and Solomon A. Sharp, each for himself deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

R. P. CLEMENT.
SOL. A. SHARP.

Subscribed and sworn to this 28th day of March, A. D. 1864, before me.
HENRY C. HYDE, *U. S. Com'r.*

[Stamp 5 cents.]

The foregoing bond is hereby approved.
San Francisco.

OGDEN HOFFMAN, *Dist. Judge.*

Endorsed: Filed March 28th, 1864.

HENRY C. HYDE, *Clerk.*

98 In the circuit court of the United States in and for the northern district of California.

JAMES E. MUNFORD, plaintiff,
vs.
C. OTIS WARDWELL, defendant. } At common law.

NOTHERN DISTRICT OF CALIFORNIA, *ss:*

I, Henry C. Hyde, clerk of the circuit court of the United States in and for the northern district of California, do hereby certify that the foreging ninety-seven (97) pages contain a full, correct, and faithful transcript of the record of the proceedings had in the above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court, at the court-house, in the city of San Francisco, this 20th day of April, A. D. 1864, and of the independence of the United States the eighty-eighth year.

HENRY C. HYDE,
[SEAL.] *Clerk Circuit Court U. S. North'n Dist. of California.*

99 In the Supreme Court of the United States.

JAMES E. MUNFORD, plaintiff in error,
vs.
CHARLES OTIS WARDWELL, defendant in error.

And now comes the said plaintiff in error, and says that in the record and proceedings of said circuit court for the northern district of California in said cause, and in the giving of judgment therein, there is manifest error in this, to wit:

That the said circuit court gave judgment against the said plaintiff, and in favor of the said defendant, whereas, by the law of the land, its judgment should have been in favor of said plaintiff, and against said defendant.

And the said plaintiff in error prays that the judgment aforesaid for the error aforesaid, and other errors in the said record and proceedings appearing, may be reversed, annulled, and for naught held, and that he be restored to all things which he hath lost thereby, and that such judgment be rendered herein as the said circuit court ought to have rendered, and that the said circuit court be ordered to enter such judgment.

JOHN VAN ARMAN, *Att'y for Pl'ff in error.*

Filed September 28, 1864.

1867

No.

In the Supreme Court

OF THE

UNITED STATES.

JAMES E. MUNFORD,

Plaintiff in Error,

VS.

C. OTIS WARDWELL,

Defendant.

DEFENDANT'S BRIEF.

JOHN W. DWINELL
DELOS LAKE,
Defendant's Counsel

SAN FRANCISCO:
TOWNE & BACON, BOOK AND JOB PRINTERS, EXCELSIOR OFFI
No. 536 Clay Street, just below Montgomery.
1867

SUPREME COURT

OF THE

UNITED STATES.

JAMES E. MUNFORD,
Plaintiff in Error,

vs.

C. OTIS WARDWELL,
Defendant.

DEFENDANT'S BRIEF.

DEFENDANT'S STATEMENT OF THE CASE.

1. This case comes up on a Writ of Error to the Circuit Court of the United States for the (late) Northern District of California, from a judgment rendered for defendant upon a special verdict in an action of ejectment, brought for one hundred vara lot No. 186, situated in the City of San Francisco.

Transcript, folios 3, 22, 52, 99.

2. The lands in controversy constitute what is called a Water Lot ; that is to say, are lands situate, and which, so far as it appears, have always been situate, below the natural high-water mark of the Bay of San Francisco.

Transcript, folios 22, 23.

3. An attempt was made on March tenth, 1847, by Gen. Kearny, Military Governor of California, to grant certain Water Lots to the town of San Francisco on certain conditions, by the issuing of a proclamation in the following terms, namely :

" I, Brigadier General S. W. Kearny, Governor of California, by virtue of authority in me vested by the President of the United States of America, do hereby grant, convey, and release unto the town of San Francisco, the people, or corporate authorities thereof, all the right, title and interest of the Government of the United States, and of the Territory of California, in, and to the beach and water lots on the east front of said town of San Francisco, included between the points known as the Rincon and Fort Montgomery, excepting such lots as may be selected for the use of the general government by the senior officers of the army and navy now there. Provided the said ground hereby ceded, shall be divided into lots, and sold by public auction to the highest bidders after three months' notice previously given, the proceeds of said sale to be for the benefit of the town of San Francisco.

" Given at Monterey, capital of California, this

10th day of March, 1847, and in the 71st year of the independence of the United States.

S. W. KEARNY,
Brig-Gen. and Governor of California.

Transcript, folios 28, 29.

But whether Gen. Kearny had any authority to exercise this act; or whether the lands he assumed so to grant included the lot in question in this action; or whether the authorities of the town of San Francisco ever assumed to sell the lot in question under Gen. Kearny's grant, the record in this case does not disclose.

Transcript, folios 28, 29.

4. On the tenth day of December, A.D. 1849, after the adoption of the State Constitution of California, (Nov. 30th, 1849) and before the admission of California into the Union, (Sept. 9th, 1850) the Alcalde of San Francisco sold the lot in question, at public auction, to one Daniel O'Brien, and on the same day executed a deed of conveyance of the said lot under said sale, to the said O'Brien.

Transcript, folios 38–44.

5. Afterwards the Legislature of the State of California, by Act passed March 26th, 1851, (Laws 1851, page 307, etc., Chap. 41) after defining certain property as "the San Francisco Beach and Water Lots," *Ib.*, § 1, made a grant of said property, including the lot in question, to the City of San Francisco, by sections 2 and 3 of said Act, which are in the words and figures following:

"§ 2. The use and occupation of all the land described in the first section of this Act is hereby granted to the City of San Francisco, for the term of ninety-nine years from the date of this Act; except, as hereinafter provided, all the lands mentioned in the first section of this Act, which have been sold by authority of the Ayuntamiento, or town, or City Council, or by any Alcalde of the said town or city, at public auction, in accordance with the terms of the grant known as Kearny's Grant, to the City of San Francisco, or which have been sold or granted by any Alcalde of the said City of San Francisco, and confirmed by the Ayuntamiento, or town, or City Council thereof, and also registered or recorded in some book of record now in the office, or custody, or control, of the Recorder of the County of San Francisco, on or before the third day of April, A.D. one thousand eight hundred and fifty, shall be and the same are hereby granted and confirmed to the purchaser, or purchasers, or grantees aforesaid, by the State relinquishing the use and occupation of the same, and her interests therein, to the said purchasers or grantees, and each of them, their heirs and assigns, or any person or persons holding under them, for the term of ninety-nine years from and after the passage of this Act; *provided*, that the City of San Francisco shall pay into the State Treasury twenty-five per cent. of all the moneys hereafter arising in any way from the sale or other disposition of the property described in the first section of this Act; the same to be paid within twenty days after its receipt by said city. The property known as the Government

Reservation is exempt from the operation of this Act; except that any estate held by virtue of any lease or leases, executed or confirmed by any officer of the United States on behalf of the same, shall be and the same are hereby granted and confirmed to the lessees thereof, and the written instrument whereby such lease or leases was made, shall, in all actions brought by the lessees for the recovery of the lands so demised, be sufficient evidence of title and possession to enable the plaintiff to recover.

"§ 3. That the original deed, or other written or printed instruments of conveyance, by which any of the lands mentioned in the first section of this Act were conveyed or granted by such Common Council, Ayuntamiento, or Alcalde; and in case of its loss, or not being within the control of the party, then a record copy thereof, or a record copy of the material portion thereof, properly authenticated, may be read in evidence in any Court of Justice in this State, upon the trial of any cause in which the contents of the same may be important to be proved, and shall be *prima facie* evidence of title and possession, to enable the plaintiff to recover the possession of the land so granted.

Transcript, fol. 23; Laws Cal. 1851, p. 309.

6. That by mesne conveyances since executed, all the right, title, and interest which the said Daniel O'Brien had in the said lot, under the said conveyance to him from the said Alcalde, and under the said Water Lot Bill, were conveyed to

the defendant in this action, prior to the commencement of this action.

Transcript, folio 48.

7. That under a regular judgment rendered against the City of San Francisco, and a regular sale under execution had under said judgment; and a regular conveyance executed by the Sheriff under such judgment and sale, all the interest which the City of San Francisco had in the said lot in question, on March 25th, A.D. 1856, passed, before the commencement of this action, to one Henry W. Seale, and from him to the plaintiff in this action.

Transcript, folios 24 to 26.

8. The sole point in the case is whether the defendant derived a valid title to the lot under the Alcalde's conveyance to his grantor.

Holladay vs. *Frisbie*,
15 Cal. 630.
Wheeler vs. *Miller*,
16 Cal. 124.

DEFENDANT'S POINTS.

POINT I.

The lands in question being below the ordinary high-water mark, belonged to the Sovereign, by virtue of sovereignty.

Transcript, folio 22.

Pollard's Lessees vs. *Hagan*,
3 Howard, U. S. R. 212.

They therefore belonged to the United States on the tenth day of March, A.D. 1847, at the time when Gen. Kearny issued his proclamation, by which he endeavored to bestow them upon the Town of San Francisco.

Transcript, folio 28.

But this attempt of Gen. Kearny to bestow these lands upon the Town of San Francisco was wholly ineffectual, because no power to make any such disposition existed. The President can make no disposition of any portion of the public domain, unless in execution of an express power bestowed by law; and this must be derived either from the treaty-making power, or from an Act of Congress.

Const. U. S., Art IV., § 3.
Wilcox vs. *Jackson*,
13 Peters, 512, 513.
United States vs. *Fitzgerald*,
15 Peters, 421.
United States vs. *Hare*,
U. S. Circuit Court, California,
October, 1867.

POINT II.

The State of California, when admitted into the Union, succeeded the United States as sovereign proprietor of all lands situate below ordinary high-water mark and within its borders.

Pollard's Lessees vs. *Hagan*,
3 Howard, U. S. Rep. 212.
United States vs. *Hare*,
U. S. Circuit Court, California,
October, 1867.

It is therefore a question of no moment whether the State of California succeeded to the full proprietorship of the lot in question, or whether the City of San Francisco held it under Kearny's grant, subject to the condition subsequent that it should "be sold at public auction, to the highest "bidder, after three months' notice previously "given, the proceeds of said sale to be for the "benefit of the Town of San Francisco."

Transcript, folio 28.

For, in the former case, the State of California would be the sovereign proprietor of the land, possessing the absolute right to dispose of it; and, in the other, would be the donor of an outstanding and unexecuted trust, with the power of all donors to enforce a strict execution of that trust, and with the additional power as sovereign to modify the execution of that trust, provided the same beneficial purpose could be as well, or better, attained by such modification.

Hart vs. *Burnett*,
15 Cal. 530.

In case Gen. Kearny's grant is held to be valid, then the Town of San Francisco held the lands in question in trust, and the same could not be sold

on execution upon judgment rendered against the town or city, and there is an end of the case.

Hart vs. *Burnett*,
15 Cal. 530.

But, on the other hand, if the lands in question, never having been previously disposed of by the sovereign power, came to the new sovereignty of California as a part of its patrimony, then the question arises whether the State of California made any such disposition of those lands as rendered them liable to judicial sale, upon a judgment rendered against the City of San Francisco.

POINT III.

The lands in question were granted by the State of California to the defendant's grantor, for the term of ninety-nine years, by the Water-Lot Bill of 1851, and the City of San Francisco never had any interest in them.

No question can be raised by either party here as to whether or not the twenty-five per cent. of the proceeds of certain sales of Beach and Water Lots was ever paid into the State Treasury, as provided by § 2 of the Water Lot Bill.

See the section cited in full, subd. 5, Statement, *ut supra*.

For this payment constituted neither a condition precedent nor subsequent.

Holladay vs. *Frisbie*,
15 Cal. 630.
Wheeler vs. *Miller*,
16 Cal. 124.

By § 2 of the California Water-Lot Bill, of 1851, the use and occupation of such of the water lots therein described, as "had been sold or granted "by any Alcalde of the City of San Francisco and "confirmed by the Ayuntamiento, or Town or "City Council thereof, and also registered or re-"corded in some book of record now [March 26th, "1851] in the office or custody, or control, of the "Recorder of the County of San Francisco, on or "before the third day of April, A.D. 1850, shall be, "and the same are hereby granted and confirmed "to the purchaser or purchasers or grantees afore-"said, by the State relinquishing" the same for the term of ninety-nine years from the passage of said Act.

And "the original deed" of the Alcalde is made, by § 3 of the same Act, "*prima facie* evidence of "title and possession."

Laws Cal. of 1851, p. 309, §§ 2, 3.

Cited in full, *ante*, subd. 5 of the defendants' statement of the case.

This "original deed" in the case at bar, appears established in the special verdict, and the fact that at the date of the passage of the Water Lot Bill, the record copy of this deed was in the office of the Recorder of San Francisco County.

Transcript, folios 39–41.

It is, therefore, *prima facie* evidence of title and possession, under the provisions of § 3, just cited.

This *prima facies* is attempted to be overcome by the plaintiff in two particulars, by arguing:

FIRST. That it does not appear that this grant by the Alcalde was ever confirmed by the Town Council of San Francisco as required by § 2 of the Water-Lot Act of 1851.

But the "original deed" itself being made *prima facie* evidence of title and possession, this includes the evidence of such confirmation until it is rebutted. The plaintiff must show, affirmatively, that there was no such confirmation. The deed itself, which is of a *hundred vara* lot, recites a resolution of the Town Council, passed December first, A.D. 1849, ordering a sale of the lot in question.

Transcript, folio 39.

This recital the plaintiff has attempted to rebut, by showing that a resolution was passed by the Council on the same first day of December, A.D. 1849, ordering a sale of two hundred and fifty *fifty-vara* lots. But this only shows that *fifty-vara* lots were ordered to be sold at that meeting of the Council, but does not exclude the possibility of a resolution being passed at the same meeting ordering *hundred vara* lots to be sold, which is necessary in order to rebut the *prima facies* of the deed.

SECONDLY. It is contended that it does appear affirmatively in the special verdict that the Alcalde's grant, under which the defendant claims this land, was not, at the time of the passage of the Water-Lot Bill, "registered or recorded in

"some book of record now [then] in the office of "the Recorder of the County of San Francisco."

Laws Cal. of 1851, p. 309 § 3.

Cited in full, *ante*, subd. 5, Defendants' statement of the case.

This point is sought to be sustained by the following finding of the special verdict:

"That all the deeds or grants made by J. W. "Geary, Alcalde of San Francisco, during his term "of office, consisted of printed blanks, on one "sheet of paper, filled up at the time they were "issued, and copies thereof, consisting of similar "blanks, filled up in like manner by his clerk, "were retained in the office of the Alcalde. The "copies were folded up, the name of the purchaser, "and number of the lot and designation of the "class to which it belonged—that is to say, whether "100-vara, 50-vara or water-lot—being indorsed "thereon, and those of each distinct class were "kept in said Alcalde's office in a separate bundle, "but these several copies were not bound or "fastened together in any manner. In that state "they passed into the office of the County Re- "corder, on its organization in 1850, where they "continued to remain in the same state until "1856, when they were bound up in the form of "books, each class forming a separate volume. "The grant to O'Brien aforesaid was filled up in "manner above stated, and a copy thereof, also "made as above stated, was kept in like manner "in the bundle composed of copies of grants of "100-vara lots, and so continued until the time it, "with the other copies, was bound up as aforesaid,

"in 1856. There was no record or registry of said "grant to O'Brien or of any other of said grants, "at any time, except as above stated."

Transcript, folios 46–48.

The question, then, is presented, whether duplicate copies, kept by an Alcalde, of deeds issued by him must be bound together, in order to entitle the collection to the designation of a "book of record."

The thing to be attained was the preservation of record evidence in an authentic, permanent and accessible form; as it is well expressed in a resolution of the Ayuntamiento of San Francisco: "Pro-"vided such grants shall appear upon the records "in the archives of the town and district of San "Francisco;" and its purpose evidently was, not to give constructive notice of the existence of such grants, but to prevent the fabrication of spurious titles. They were already "records," whether bound or not.

Kyburg vs. *Perkins*,
6 Cal. 674;

Transcript, folio 45.

It is not the binding which constitutes a book. It is the materials of which the book is to be composed. These sheets in the Recorder's office furnished such materials, ready to assume the form of *bound* books, which they did assume under the binder's hands in 1856, as the special verdict shows. Interpreting, then, the statute according to its spirit and evident intent, these two "separate bundles" of official copies of official grants, constituted two

separate "books of record" of Alcalde grants in the office of the Recorder of San Francisco, by the application of the same rule which construes "beyond seas," in an English Statute of Limitations, adopted verbally by one of the States of the American Union, to mean, "out of the State."

Murray vs. *Baker*,
3 Wheat. 541 ;
Shelby vs. *Guy*,
11 Wheat. 361.

JOHN W. DWINEELE.
DELOS LAKE,
Defendant's Attorney.

IN THE SUPREME COURT

OF THE UNITED STATES.

JAMES E. MUNFORD,

PLAINTIFF IN ERROR,

VERSUS

CHARLES OTIS WARDWELL,

DEFENDANT IN ERROR.

Abstract of Case and Brief for Appellant.

SAN FRANCISCO:

PRINTED BY J. THOMPSON & CO., 505 CLAY STREET.

1865.

IN THE
SUPREME COURT
OF THE UNITED STATES.

JAMES E. MUNFORD,
PLAINTIFF IN ERROR,

vs.

CHARLES OTIS WARDWELL,
DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

This is an action brought on the 25th day of September, 1862, in the late "Circuit Court of the United States for the Districts of California," to recover the possession of a lot of ground in the city of San Francisco, described by metes and bounds as follows, to wit:

"Commencing at a point in the northwesterly line of Brannan street, two hundred and seventy-five (275) feet southwestwardly from the southwesterly line of Fourth street; thence northwestwardly parallel to said line of Fourth street, two hundred and seventy-five (275) feet; thence southwestwardly parallel to said

line of Brannan street, two hundred and seventy-five (275) feet; thence southeastwardly parallel to said line of Fourth street, two hundred and seventy-five (275) feet to said line of Brannan street; thence northeastwardly along said line of Brannan street, two hundred and seventy-five (275) feet, to the point of commencement."

Said action was, by the third section of the Act of Congress, entitled "An Act to provide Circuit Courts for the Districts of California and Oregon, and for other purposes," approved March 3d, 1863—transferred to the Circuit Court of the United States in and for the Northern District of California, created by that Act, where it was on the 26th day of August, 1863, tried before the presiding Justice of said Court and a Jury.

Said Jury, under instructions from the Court, found a general verdict for the plaintiff, subject to the opinion of the Court upon a statement of facts which was agreed to by the counsel of said parties respectively, and entered of record on the 5th day of September, 1863, as a special verdict in said action.

Said special verdict finds in substance as follows:

[PLAINTIFF'S TITLE.]

That the lot of ground sued for in said action was, at the time of the admission of California into the Union as a State, to wit, on the 9th day of September, A. D. 1850, and thence down to and on the 26th day of March, A. D. 1851, wholly covered by the tide waters of the Bay of San Francisco at all ordinary high tides, and wholly below the natural high water mark of said Bay.

That on said 26th day of March, 1851, the Legislature of California passed the Act, entitled "An Act to provide for the disposition of certain property of the State of California," (commonly called the "San Francisco Water Lot Act,") which, as printed in the Statute Book of said State for said year, from page 307 to 310, both inclusive, is made part of said verdict; the first and second sections of which Act are in the words and figures following, to wit:

"§ 1. All the lots of land situated within the following boundaries, according to the survey of the city of San Francisco, and the map or plat of the same now on record in the office of the Recorder of the county of San Francisco, are known and designated in this Act as the San Francisco Beach and Water Lots: that is to say, beginning at the point where the eastern line of Simmons street intersects the southern boundary line of the city; thence northerly on the eastern line of Simmons street, to the southern line of South street; thence easterly on the southern line of South street to a point three hundred and seventy-five feet easterly from Simmons street; thence at right angles to South street, northerly to the eastern line of Hubbel street; thence easterly on the line of Hubbel street, two hundred and seventy-five feet; thence northerly at right angles to Hubbel street, to the southern side of Hooper street; thence easterly on the southern line of Hooper street to the eastern line of Fifth street; thence northerly on the eastern line of Fifth street, to the southern line of Channel street; thence easterly on the southern line of Channel street, to the eastern line of Third street; thence northerly on the eastern line of Third street to the southern line of Berry street; thence easterly on the southern line of Berry street to the eastern line of Second street; thence northerly on the eastern line of Second street, to the southern line of King street; thence easterly on the southern line of King street, three hundred and seventy-five feet; thence northerly at right angles to King

street, to the southern line of Townsend street; thence easterly on the southern line of Townsend street, to the eastern line of First street; thence northerly on the eastern line of First street, to the southern line of Brannan street; thence easterly on the southern line of Brannan street, to the eastern line of Beal street; thence northerly on the eastern line of Beal street, to the southern line of Bryant street; thence easterly on the southern line of Bryant street, to the eastern line of Spear street; thence northerly on the eastern line of Spear street to a point within one hundred and thirty-seven and one-half feet of the southern side of Harrison street; thence easterly at right angles to Harrison street, to the eastern side of Stuart street; thence northerly on the eastern line of Stuart street, to the southern line of Folsom street; thence easterly on the southern line of Folsom street, to the eastern line of East street; thence northerly on the eastern line of East street, to its point of intersection with the northern side of Jackson street; thence northerly at right angles with the northern side of Jackson street, to the northern line of Pacific street; thence westerly along the northern side of Pacific street, to the eastern line of Davis street; thence northerly along the eastern line of Davis street, to the northern line of Vallejo street; thence westerly along the northern line of Vallejo street to the eastern line of Front street; thence northerly on the eastern line of Front street, to the northern line of Greenwich street; thence westerly on the northern line of Greenwich street, to the eastern line of Battery street; thence northerly on the eastern side of Battery street, to the northern line of Lombard street; thence westerly on the northern line of Lombard street to the eastern line of Sansom street; thence northerly on the eastern line of Sansom street to the northern line of Chesnut street; thence westerly on the northern line of Chesnut street, to the eastern line of Montgomery street; thence northerly on the eastern line of Montgomery street, to the northern line of Francisco street; thence westerly on the northern line of Francisco street, to the eastern line of Kearny street; thence northerly on the

eastern line of Kearny street to the northern line of North Point street; thence westerly on the northern line of North Point street, to the east line of Dupont street; thence northerly on the eastern line of Dupont street, to the northern line of Beach street; thence westerly on the northern line of Beach street, to the eastern line of Powell street; thence northerly on the eastern line of Powell street, to the northern line of Jefferson street; thence westerly on the northern line of Jefferson street, to the western line of Larkin street; thence following the line of ship's channel to the western boundary line of said city; thence southerly along the western boundary line of said city, to the natural high water mark; thence along the line of the said high water mark, to its point of intersection with the southern boundary line of said city; thence easterly along the southern boundary line of said city, to its point of intersection with the eastern line of Simmons street, being the place of beginning.

"§ 2. The use and occupation of all the land described in the first section of this Act is hereby granted to the city of San Francisco, for the term of ninety-nine years from the date of this Act; except as hereinafter provided: All the lands mentioned in the first section of this Act, which have been sold by authority of the ayuntamiento, or town, or city council, or by any alcalde of the said town or city, at public auction *in accordance with the terms of the grant known as Kearny's grant to the city of San Francisco;* or which have been *sold* or *granted* by any alcalde of the said city of San Francisco, and *confirmed* by the ayuntamiento, or town, or city council thereof, and also *registered* or *recorded* in some *book of record* now in the office, or custody, or control of the Recorder of the county of San Francisco, *on or before the third day of April, A. D. one thousand eight hundred and fifty,* shall be and the same are hereby granted and confirmed to the purchaser, or purchasers, or grantees aforesaid, by the State relinquishing the use and occupation of the same and her interests therein to the said purchasers or grantees, and each of them, their heirs and assigns or any person or persons holding under them, for

the term of ninety-nine years from and after the passage of this Act: *Provided*, That the City of San Francisco shall pay into the State Treasury twenty-five per cent. of all moneys hereafter arising in any way from the sale or other disposition of the property described in the first section of this Act; the same to be paid within twenty days after its receipt by said City. The property known as the Government Reservation is exempt from the operation of this Act; except that any estate held by virtue of any lease or leases executed or confirmed by any officer of the United States on behalf of the same, shall be and the same are hereby granted and confirmed to the lessees thereof, and the written instrument whereby such lease or leases was made shall, in all actions brought by the lessees for the recovery of the lands so demised, be sufficient evidence of title and possession to enable the plaintiff to recover."

That the lot of ground sued for in this action is situated and included within the boundaries mentioned and described in the foregoing recited first section of said "Water Lot Act," and is not part of the "Government Reservation" mentioned therein.

That a judgment was duly rendered by the Superior Court of the city of San Francisco, a Court of competent jurisdiction, on the 25th day of March, and duly enrolled and docketed on the 27th day of March, 1856, in favor of one G. C. Wardwell, against said city of San Francisco, for the sum of $1,070 25, upon which judgment a writ of execution, in due form of law, was issued on the 12th day of January, A. D. 1858, and delivered to the Sheriff of San Francisco City and County to be executed, under authority and in obedience to the command of which the said Sheriff duly levied upon said lot of ground now sued for, and after due legal notice, sold the same on the 13th day

of February, A. D. 1858, to one Henry W. Seale; and on the 17th day of October, A. D. 1859, no redemption thereof having been made, duly executed, acknowledged and delivered to him, his Sheriff's deed for said lot, which deed was thereafter duly recorded in the Recorder's office of the city and county of San Francisco.

That, by subsequent mesne conveyances duly executed and delivered, the plaintiff herein had, prior to the date of his title as alleged in his complaint, acquired, and then, and has ever since, held, and still holds, all the estate, right, title and interest in and to said lot of ground, which was acquired by said Henry W. Seale, under and by virtue of said Sheriff's sale and deed:

(See 1st, 2d, 3d and 4th findings of said special verdict.)

This is in substance the plaintiff's title to said lot.

Said verdict further finds in substance as follows:

[DEFENDANT'S TITLE.]

That on the 1st day of December, A. D. 1849, the Ayuntamiento, or Town Council of San Francisco, passed a resolution or ordinance in the words and figures following, to wit:

"Be it ordained that 200 *fifty-vara* town lots be sold at public auction, on Friday, the 10th instant."

That on said 10th instant, to wit: December 10th, 1849, John W. Geary, as Alcalde of said town, made sale at public auction, and executed and delivered, to one Daniel O'Brien a deed of a supposed lot of ground, described in said deed as "*hundred vara* lot numbered

one hundred and eighty-six, situated in said town on the Bay of San Francisco, bounded on the northwest by lot one hundred and eighty, on the east by lot one hundred and seventy, and *on the south by said Bay*, being a *fractional lot*."

That on the 1st day of April, A. D. 1850, the following preamble and resolution, accompanied by the report of a committee thereon, were adopted by the Ayuntamiento, or Town Council of San Francisco, to wit :

" Whereas there was no organized Town Council for the town and district of San Francisco *from the 1st of January to the 1st of August*, 1849, to provide by legislation the ways and means for the necessary improvement of the Town and expenses of the municipality thereof, thereby throwing the entire weight and responsibility upon the Alcalde and Chief Magistrate for the raising and providing the funds necessary for the purposes and for the maintenance of the proper authority of the said Town, and which, in consequence, could only be effected by a resort to the sale *by grant in the usual form* of a portion of the public domain of the said Town and District, therefore,

" *Resolved*, That the Town Council do hereby approve confirm and ratify all *grants* of lands made within the jurisdiction of the Town and District of San Francisco, by the Alcalde and Chief Magistrate thereof, to raise the necessary funds *for the purposes aforesaid*, during his term of office, provided *such grants* shall appear upon the records in the archives of the Town and District of San Francisco."

That all the deeds made by John W. Geary, Alcalde of San Francisco, during his term of office, consisted of printed blanks, each on one sheet of paper, filled up at the time they were issued, and that copies thereof, consisting of similar blanks, filled up

in like manner by his clerk, were retained in the office of the Alcalde ; said copies being folded up, the name of the purchaser and number of the lot, and designation of the class to which it belonged—that is to say, whether one hundred vara lot, fifty vara lot, or water lot—being endorsed thereon, and those of each distinct class being kept in said Alcalde's office in a separate bundle ; but these several copies were *not bound*, nor *fastened together in any manner;* and in that state they passed into the office of the County Recorder on its organization in 1850, where they continued to remain, *in the same state*, until 1856, when they were bound up in the form of books, each class forming a separate volume. The deed to O'Brien, aforesaid, was filled up in manner above stated, and a copy thereof, also made as above stated, was kept in like manner *in the bundle* composed of copies of deeds of 100 vara lots, and so continued until the time that it, with the other copies, was bound up as aforesaid, in 1856. There was *no record or registry* of said grant to O'Brien, or of any other of said grants [that is, of one hundred vara lots] at any time, *except as above stated.*

That by mesne conveyances since duly executed, acknowledged and delivered, the said defendant herein had, prior to the commencement of this action, acquired and then held, and still holds, all the estate, right, title and interest in and to said lot of ground now sued for, which was *acquired by the said Daniel O'Brien, under and by virtue of the instrument of writing executed to him by the said Geary as aforesaid, and under and by virtue of said Act of the Legislature of California, passed March 26th*, 1851, *commonly known as the "San Francisco Water Lot Act."*

That said defendant was in the possession of the lot of ground sued for, at the commencement of this action, holding the same adversely to said plaintiff, and has been in such possession since the 25th day of July, 1859.

This is, in substance, the defendant's title to said lot, if any he has.

Upon these facts the plaintiff's title to the lot of ground sued for is unquestionably perfect; *provided*, the so-called "San Francisco Water Lot Act" did not pass the title thereof to the said Daniel O'Brien, or those claiming under him, as being within the "*exception*" contained in the 2d section of said Act.

The lot sued for is, as before mentioned, expressly found to be "situated and *included within the boundaries mentioned and described in the first section of said Act*, and not part of the Government Reservation therein mentioned."

It was, therefore, beyond question, *subject* to the operation of the 2d section of said Act, which granted the use and occupation for ninety-nine years from its date, of *all the land* described in said 1st section, to the city of San Francisco, *except* those portions thereof which had been either—

First: "*Sold* by authority of the Ayuntamiento, or Town or City Council, or by any Alcalde of the said Town or City, at public auction, *in accordance with the terms of the grant known as Kearny's Grant to the City of San Francisco*," or—

Second: "*Sold* or *granted* by any Alcalde of the said city of San Francisco, and *confirmed* by the Ayuntamiento or Town or City Council thereof, and also *registered* or *recorded*

on or before the 3d day of April, A. D. 1850, in some *book of record*, now, [that is, on the 26th day of March, A. D. 1851,] in the office, or custody, or control of the Recorder of the county of San Francisco."

The sole questions to be determined in deciding this case, therefore, are—Whether, upon the *facts found* in the special verdict the *lot now sued for* is shown to be within *either of the two classes* mentioned in said "exception," viz:

First: Is it shown to have been "*sold* by authority of the Ayuntamiento or Town or City Council, or by any Alcalde of the said Town or City, at public auction, *in accordance with the terms of the grant known as Kearny's Grant to the City of San Francisco.*"

In the Court below, it was not even *contended* that the lot in dispute comes within this description. But as the question is one of law, which may possibly be made in this Court, though not made in the Court below, we deem it proper briefly to notice some of the reasons which exist, why the lot sued for does not come within said *first class.*

(1.) In the first place, the words used in describing the lots embraced in said *first class*, were intended to apply, and do, in fact, apply, only, to the lots which were *included within* and *part of* the so-called "Kearny Grant," which lots, and *none others* were, in common parlance and usage, and in the various proceedings of the Ayuntamiento, or Town Council of San Francisco, from the making of said "Kearny Grant" down to the cessation of said Ayuntamiento, by the adoption of a State Government, called and known as "water lots," or "beach and water lots," all of which were situated "on the *east front* of said town of San Francisco, and *included between* the points

known as *the Rincon* and *Fort Montgomery*," and fully *one mile distant* from the lot now in dispute.

A portion of these "water lots" were sold on the 20th, 21st and 22d days of July, A. D. 1847, by the then "Alcalde" of San Francisco, *without the authority* of any Ayuntamiento, or Town Council, there being none in existence at that time, and *another portion*, to wit, the balance, sold on the 3d day of January, A. D. 1850, *by the order* and *authority* of the then existing Ayuntamiento, both of said sales being made *after three months notice thereof previously given*, in accordance with the terms of said "Kearny Grant."

(See 6th, 7th, 8th, 9th, 18th, 19th, 20th, 24th, 29th, 30th and 31st findings of special verdict. Also, see Wm. Carey Jones' Report on California Land Titles in Senate Ex. Doc. No. 18 of 31st Cong. 1st Session, pp. 27, 28, and 132 to 136.)

(2.) In the second place, it is beyond question, that *the particular lot* now sued for, was never, in *fact*, sold by the said Geary, *nor any part of it.*

The special verdict finds that, "on the 10th day of December, A. D. 1849, the said John W. Geary, as Alcalde of said town, sold at public auction to one Daniel O'Brien, *the lot described in the deed* of the said Geary to the said O'Brien, hereinafter set forth," etc.

It is to the *description in the deed*, therefore, and to that alone, that we must resort to ascertain *what* lot was then sold by the said Geary, and whether it is, or is not, in whole, or in part, *the same* as that now sued for.

By reference to said deed, it appears that the lot

so sold was one which was situated on the Bay of San Francisco, and "*bounded* on the northwest by lot number one hundred and eighty, on the east by lot one hundred and seventy, and *on the south by said Bay*, being a *fractional lot.*"

It was described as a "hundred vara lot," not because it was understood or supposed to contain one hundred varas square, for if this were so, it would not have been described as a *fractional* lot, but simply because it was situated, or *supposed* to be situated, *within that part of the city which was laid off into one hundred vara lots*, and where *all full lots* contained one hundred varas square, and which part was, for that reason, called the "one hundred vara survey," in contradistinction to the "fifty vara survey," where full lots contained only fifty varas square.

Inasmuch, therefore, as the *lot now sued for* is found by the special verdict to have been "*wholly covered with the tide waters of the Bay of San Francisco*, at all ordinary high tides, and *wholly below the natural high water mark* of said Bay, it is clear that the land described in said deed to O'Brien, which was wholly *above* said *high water mark*, being *bounded south by said Bay*, could not have *included any part* of the *lot now sued for.*

The law is well settled, that a lot bounded *by a Bay* or *navigable river*, in which the tide ebbs and flows, is bounded *by high water mark* on such bay or river, and *includes no land* which is *below* high water mark.

Chancellor Kent says: "It is a settled principle in the English law, that the right of soil of owners of land *bounded by the sea*, or on navigable rivers where

the tide ebbs and flows, extends to *high water mark.*"

3 Kent's Com. 427.

In ex-parte Jennings, the Supreme Court of New York say:

"A public grant bounded on the margin of such waters [*i. e.*, streams, rivers, or arms of the sea, where the tide ebbs and flows], extends by construction *no farther than high water mark,*" etc.

6 Cow. 528.

In the case of Arnold vs. Munday, the Supreme Court of New Jersey say: "that though a grant of land to a subject or citizen bounded upon a fresh water stream, or river not navigable, and where the tide neither ebbs nor flows, extends to the channel of such river, *usque ad filum aquæ*, as they have it in our old books; yet that a grant of land bounded *upon a river or other water which is navigable, and where the tide does ebb and flow*, extends *to the edge of the water only*, that is to say, *to high water mark and no further.*"

1 Halst. 67.

So also, the Supreme Court of Massachusetts, in the case of the Commonwealth vs. Charlestown: "By the common law, it has been seen, he to whom a house-lot was granted, which was *bounded upon the sea*, would be the proprietor *only as far as high water mark.*"

1 Pick. 183.

Whether, at the time of the sale of lots made by Geary on the 10th day of December, 1849, there was *supposed to be* a "fractional lot" between lots numbers one hundred and seventy, one hundred and eighty, and the Bay of San Francisco, cannot, as it appears to us, make any difference in this case.

Such *supposition*, erroneous or otherwise, cannot *alter the fact*, nor make the deed to O'Brien *include* land which, by its terms, it does *not include*.

The facts found by the special verdict in regard to the *manner* in which town lots were *laid off* and disposed of, in those *very fast* days, show *how easily* an error in this respect may have occurred. The laying off was, it seems, by the simple process of the City Surveyor "*projecting on the official map*" the lines of certain streets, and "laying out *on said map* the unsurveyed ground" between certain given points, into lots of the required size!

No *actual survey on the ground* was made, so that the number of one hundred vara lots which could be laid off *before the Bay was reached*, was a matter of mere rough conjecture and calculation.

(See 21st, 25th and other findings of special verdict.)

In addition to the clear legal, as well as popular, meaning of the *words* used in said deed, in limiting the southern boundary of said supposed or real "fractional lot," other reasons might be mentioned why, without departing from the manifest *intention* of its maker, those words cannot be extended, by construction, to include any land *covered* by the Bay of San Francisco. As before intimated, the very fact that only a *fractional* lot was offered for sale and attempted to be conveyed, and that it was *bounded* on the south by the Bay of San Francisco, shows that it was not *intended* to sell or convey a *full* lot, nor that the lot then sold should extend at all *into* said Bay, but only *to* it—that is, to *high water mark* thereon.

Hence, also, in the Resolution of the Ayunta-

miento, before referred to, authorizing the laying off of the land south of Market street, and between that street and the Bay, into one hundred vara lots, they direct the City Surveyor, "to project the one hundred vara lots *to* the Mission Bay" only, not *into it*. It is moreover a fact, that from the date of the said "Kearny Grant" down to the making of the deed in question, the said "Kearny Grant" was *regarded* and *treated* by the authorities of San Francisco as valid, and as the *only source of authority* for the sale or disposition by them of any land at San Francisco, which was *covered by tide water*.

Moreover, the land *covered by tide water*, which was sold by the town authorities, was laid out into lots of *much smaller size* than the *up-land*, to wit: into lots of 45 feet 10 inches only in front, by 137½ feet deep. Such was the size of all the lots laid out within the limits of the so-called "Kearny Grant," which, as before remarked, were the only lots *covered by tide water* which the town authorities considered they had the *power* to sell, and the only ones of that description which they *intended* to sell, down to the time of the establishment of the State Government.

(3.) In the third place, even had it been shown that the *lot now sued for* was "sold" by the said Geary, it is *not* shown that such sale was made "in accordance with the terms of the grant known as Kearny's Grant to the city of San Francisco," but the *contrary* clearly appears.

The "terms" of that "Grant" were, as before stated, that before the land referred to could be sold, "three months notice" of such sale must be "previously given."

In reference to the "fractional lot" in question, instead of *three months* previous notice of the sale thereof, said special verdict does not show that *any* previous notice whatever was given; but, on the contrary, it shows that the Resolution of the Ayuntamiento, *directing the laying off*, by the City Surveyor, of the land as far south as the Bay, into one hundred vara lots, was not passed until *November third*, A. D. 1849; and the Resolution ordering a sale of *fifty vara* lots, under *pretended* authority of which the sale of said "fractional lot" was made, was passed only *ten days* previously to the making of said sale.

(See 21st, 26th and 27th findings of said special verdict.)

It seems, therefore, beyond serious controversy, that the *lot sued for in this action* does not come under the *first class* mentioned in the "exception" to the Legislative grant to the city of San Francisco, contained in the 2d section of said "Water Lot Act," for both of the reasons above mentioned:—first, that, lying entirely *outside* of the boundaries of said "fractional lot," it was never "sold" by said Alcalde Geary; second, that if it had been included within the boundaries of said "fractional lot," so as to have been "sold" within the meaning of said 2d section, it was not sold "in accordance with the terms of the grant known as Kearny's Grant to the city of San Francisco," for the reason that "three months previous notice" of such sale was never given.

Second. Is the *lot now sued for* shown by said special verdict to be within the *second class* of cases "excepted" from the Legislative grant to the city of San Francisco, contained in the 2d section of said "Water

Lot Act"—that is, is it shown to have been "*sold or granted* by any Alcalde of the said city of San Francisco, and *confirmed* by the Ayuntamiento, or Town or City Council thereof, and also *registered* or *recorded* on or before the 3d day of April, A. D. 1850, in some *book of record*," which was, on the 26th day of March, A. D. 1851," in the office, or custody, or control of the Recorder of the County of San Francisco?"

(1.) That the lot now sued for was not, nor any part of it "sold" by Alcalde Geary, has been already sufficiently considered. The word "granted," used in connection with the word "sold," in defining this *second class* of cases, "excepted" from said Legislative grant, was, doubtless, intended to apply to, and include the cases (mentioned in said special verdict) of "water lots" (that is, lots laid off as such within the "Kearny Grant"), which had been, during the non-existence of any Ayuntamiento or Town Council, disposed of by T. M. Leavenworth, one of said Alcaldes, by *private grant on petition*, and has, therefore, of course, no application to the lot now in dispute.

(See 10th, 11th, 12th, 14th and 15th findings of said special verdict.)

(2.) No "*confirmation*" by the Ayuntamiento, or Town or City Council of San Francisco, of the sale of the *lot now sued for*, has ever taken place.

Of course, if our position is correct, that *this particular lot* was never sold by Alcalde Geary, no sale of it could ever have been "confirmed."

But we say that, even supposing the sale by said Geary, and deed of said "fractional lot," which was wholly *above* high water mark, to have covered and

included the *entire one hundred vara lot now sued for*, which has always been wholly *below* high water mark still, there is shown by the special verdict no "confirmation" by any Ayuntamiento, or Town or City Council of San Francisco, of the sale of said "fractional lot."

The only proceedings of any Ayuntamiento, or Town or City Council, set forth in said special verdict which can be even *pretended* to amount to such "confirmation," are those which took place on the 1st day of April, A. D. 1850, which have been already recited in this brief.

(See also 35th finding of said special verdict.)

That those proceedings had *no reference*, nor *any application whatever* to the sale of the "fractional lot" in question, made, as it was *at public auction* on the *tenth day of December*, 1849, during the *organized existence* and *actual sitting* of the Town Council of San Francisco, and under *color* of its express authority, will be most clearly manifested upon a very slight examination.

The "Preamble" by which the "Resolution" contained in said proceedings is introduced, shows most clearly the *subject matter* and *class of titles* to which said Resolution was intended to apply.

It was to titles which had ~~been~~ been created (1) "*by grant* in the *usual form*," that is, *on petition*. (2) between "*the first of January and the first of August*, 1849," (3) when "there was *no organized Town Council* for the town and district of San Francisco;" (4) to lots which were then considered "*a portion of the public domain of the said town*."

It was such "grants" (not "*sales* at *public auction*") made, in the language of said resolution, "to raise the necessary funds *for the purposes aforesaid*," (that is, for the purpose expressed in said "preamble," to wit: "to provide the ways and means for the necessary improvement of the town, and expenses of the municipality thereof, *from the first of January to the first of August*, 1849," and whilst "there *was no organized Town Council*,") that said Ayuntamiento of April 1st, 1850, "approved, *confirmed* and ratified." It was a class of grants which were understood to have been *illegally* made, but which, inasmuch as the property was considered as *belonging to the town*, the Ayuntamiento claimed the *power* either to repudiate or confirm, as they thought proper. The "Alcalde" referred to in said resolution was not *John W. Geary*, but *T. M. Leavenworth*, for the latter alone had held, and exercised the functions of said office "from the 1st of January to the 1st of August, 1849," during the non-existence of any organized Town Council.

(See 10th, 14th, 15th and 16th findings of said special verdict.)

The *lots* which were so considered "a portion of the *public domain of the said town*," and which had been so *illegally* granted, and the grants of which, therefore, said Ayuntamiento, by said resolution, undertook to "confirm," were "water lots," within said "Kearny Grant," the same which are referred to in the 15th finding of said special verdict, as having been granted by said Leavenworth between said 1st day of January and 1st of August, 1849, "to raise funds for the uses and purposes of said town."

(See 15th finding of said special verdict.)

These same illegally granted "water lots" are again referred to in the proceedings of said Ayuntamiento of Oct. 3d, 1849, at which time they were *expressly repudiated*, and it was "*Resolved*, that immediate public notice be given that the grants of *all water property* heretofore made to any person or persons whatever, by the late Alcalde, *T. M. Leavenworth*, or by any of his predecessors, *without three months notice previous to making such grant*, or sale *at public auction*, as *by law required*, are *illegal*, and that the same property will be claimed and held by the town until sold *at public auction agreeably to the conditional grant* made by the *Government* to the town."

(See 18th finding of said special verdict.)

The same matter was again referred to in the preamble and resolution passed by said Ayuntamiento on the 24th day of December, A. D. 1849, in which they direct, "that the said *Mr. Leavenworth* be proceeded against according to *law*, and he be required to give bonds to *indemnify the town* against any loss that may arise from such *illegal* grants, and that our attorney be instructed to *so prosecute*, and *without delay*."

(See 28th finding of said special verdict.)

The proceedings authorized against the said Leavenworth by the last mentioned resolution, appear to have led to a "communication" from him to said Ayuntamiento, on the 30th day of January, A. D. 1850, "with the *account* of the said Leavenworth of his *receipt and disbursement of municipal funds* whilst *acting as Alcalde* of said town and district," which "communication" and "account," it appears, were thereupon referred to the Committee on Finance of

said Ayuntamiento, together with said Alcalde Geary."

(See 31st finding of said special verdict.)

On the 18th day of March, A. D. 1850, this Committee "reported a *balance due the said Leavenworth* from the said town of San. Francisco, of *five thousand two hundred and seventy-four dollars and eighty-seven cents*, which was thereupon ordered to be paid *as soon as there should be a surplus of funds* in the treasury of said town."

(See 34th finding of said special verdict.)

It was upon this "report," showing that *all monies* received by the said Leavenworth, both for his grants of *up-land* lots (which he was considered as having had the power to make), and for his grants of "water lots" within the "Kearny Grant" (which were considered as having been "illegally" made), had been *faithfully accounted for* and *applied to* "*the necessary improvement of the town and expenses of the municipality thereof*;" and that, notwithstanding said grants, the said Leavenworth was largely *in advance* to said town—thereby evincing a cogent *excuse*, if not *necessity*, for the making of said illegal grants—and for the purpose of removing the uncertainty in regard thereto, that said Ayuntamiento, on the 1st day of April, A. D. 1850, adopted the "preamble and resolution" for the "confirmation" of those "illegal grants" above referred to.

(See 35th finding of said special verdict.)

(3.) Had it even been shown by said special verdict, that the *lot now sued for* was *covered by* and *included within* said "fractional lot," and that it had consequently been "sold" by said Alcalde Geary, by

the deed executed by him to said O'Brien, and that such sale had been "confirmed" by the Ayuntamiento, or Town or City Council of San Francisco, we think it is *beyond dispute* that such deed was not "*registered* or *recorded* on or before the 3d day of April, A. D. 1850, in a *book of record*" which was on the 26th day of March, A. D. 1851 (the date of the passage of said "Water Lot Act"), "in the office, or custody, or control of the Recorder of the county of San Francisco."

The *facts* upon which this question depends are in few words as follows: that a printed blank, filled up so as to constitute a copy of said deed, consisting of *one sheet of paper folded up*, with the name of the purchaser, the number of the lot, and its class—to wit: a one hundred vara lot—endorsed thereon, was retained in the office of said Alcalde, at the time the original thereof was delivered to said O'Brien, and there kept in *a bundle* of such copies of grants of one hundred vara lots, said copies *not being bound*, nor *fastened together in any manner*, but remaining and continuing, when they passed into the office of theCounty Recorder, on its organization in 1850, and thereafter down to a period much later than the 26th of March, A. D. 1851, *in that same state and condition*, and that there was no *record*, or *registry* of *said grant to O'Brien*, at any time, unless the above mentioned facts constituted one.

(See 37th finding of and special record, ft)

The question, therefore, is, did the foregoing facts constitute a "registering" or "recording" of said deed in a "*book* of record?"

The mere *stating* of this question, it seems to us, is the *answering* of it. The meaning of the words "registered," and "recorded," and "*book* of record," are, and were on the 26th day of March, 1851, as well

understood as any in the English language. To "register" a deed in a "book of record" has for a half century past, at least, signified, to *copy such deed into such book*, either at full length, or at least in substance.

To "record" a deed in such "book" has generally, if not always, been applied to the *transcribing into it of an exact copy*. The word "book" has always signified *a number* of sheets of paper or parchment, *bound*, sewed or *attached together in some manner*, so as to constitute *a volume*. It has never signified, nor been applied to a *bundle* of *folded papers;* still less to a *single sheet* in such bundle.

The Supreme Court of California, it seems to us, have directly decided this question.

Chapin vs. Bourne, 8 Cal. 296.

This "registering," or "recording," has been decided by this Court to be as necessary to the *first class* of cases mentioned in the "exception" contained in the 2d section of said "Water Lot Act," as to the *second class*.

Field vs. Seabury et al. 19 How. 324–333.

We submit, therefore, that in no fair, not even possible sense, in which the words in question could have been used by the Legislature, could the facts found in said special verdict have constituted either a "registering" or "recording" of said deed in a "*book* of record."

In conclusion, we will only add that the plaintiff's title to the *lot now sued for* being complete and perfect under the Legislative grant to said City of San Fran-

cisco, contained in the first clause of the 2nd section of said "Water Lot Act;" and the defendants alleged title, neither covering said lot, nor any part of it, and having no original validity, nor having acquired any from either of the confirmatory clauses in the "exception" to said Legislative grant, contained in said 2nd section, it seems to us that the judgment of the said Circuit Court was clearly erroneous, and that it ought to be reversed, and said Court directed upon the facts found and agreed to in said special verdict, and appearing of record, to render a judgment for said plaintiff for the recovery of said lot.

Thomas Emmet &
for Plff in Error

No. 29.

IN THE SUPREME COURT

OF THE UNITED STATES.

JAMES E. MUNFORD,

PLAINTIFF IN ERROR,

VS.

C. OTIS WARDWELL,

DEFENDANT.

DEFENDANT'S BRIEF.

C. T. BOTTS,

Counsel for Defendant.

WASHINGTON:
INTELLIGENCER PRINTING HOUSE,
401 and 403 D Street, near 7th.
1867.

IN THE

SUPREME COURT

OF THE UNITED STATES.

JAMES E. MUNFORD,
PLAINTIFF IN ERROR,

vs.

C. OTIS WARDWELL,
DEFENDANT.

BRIEF FOR DEFENDANT.

STATEMENT OF THE CASE.

This is an action of ejectment instituted to recover possession of the lot numbered and marked as one hundred-vara lot No. 186 upon the official map of the City of San Francisco.

The complaint is in the usual form: the answer denies all the allegations of the complaint, and sets up title in the Defendant; the replication denies the affirmative allegation of the answer.

These are all the pleadings, and all that are admissible under the practice that obtains in California. Upon the trial of the case, the jury rendered a special verdict, and upon this verdict the Court gave judgment for the Defendant.

The alleged ground of error is, that upon the verdict judgment should have gone for the Plaintiff instead of the Defendant.

The material facts disclosed by the verdict are, that the lot in controversy was, on the 26th day of March, 1851, below the natural high-water mark of the bay of San Francisco; that it was within the boundaries, and, therefore, within the operation of the legislative act of the 26th of March, 1861, commonly known as the "Water Lot Act;" that the said lot was, upon the 1st day of December, 1849, sold and conveyed by the then Alcalde of San Francisco, John W. Geary, to one Daniel O'Brien, from whom it has, by mesne conveyances, descended to the Defendant; that the Plaintiff acquired all the right, title, and interest in this lot which was vested in the City of San Francisco on the 17th day of October, 1859.

It is admitted, in conformity with the repeated decisions of the Court, that the fee in the land below high-water mark in the bay of San Francisco, attached to the State of California as an appurtenance of sovereignty. See Pollard's Lessee vs. Hagan, 3 Howard, 212; New Orleans vs. The United States, 10 Peters, 738, and Plaintiff's Brief, *passim.*

Such was the condition of the lot in controversy on the 26th March, 1851, the date of the Water Lot Act.

By that act the property within certain defined boundaries, with certain specified exceptions, was granted to the City of San Francisco; and the question in this case is, simply, whether the lot in controversy is includ-

ed in the general grant, or is comprised in one of the exceptions.

ARGUMENT.

The first point that we make is, that the *onus* lies upon the Plaintiff to show that the premises are not included in the exceptions; this is only to say, what cannot be denied, that it is imperative upon him to show that they are included in the grant to the city.

If he had simply shown that the lot was included in the general boundaries of the Water Lot Act, and stopped there, he must have been defeated, because he would have failed in showing that it was necessarily included in the grant to the city.

Has he succeeded in this attempt? Let us see.

Amongst the exceptions to the general grant is the following: "All of the said lands which have been sold or granted by any Alcalde of the said City of San Francisco, and confirmed by the Ayuntiamento, or town, or City Council thereof, and also registered or recorded in some book of record now in the office, or custody, or control of the Recorder of the County of San Francisco, on or before the 3d day of April, 1850." (See Laws of Cal., 1850, p. 309, and Plaintiff's brief, p. 5.)

We contend that the facts of this case, which we can only know from the special verdict, do not show that the lot in controversy was not within this exception.

It appears that the lot declared for is described as one hundred vara lot, number one hundred and eighty-six, (186,) as laid down, numbered, and represented on the official map of said City of San Francisco. (See complaint, p. 1, of Transcript.)

It also appears that John W. Geary, duly elected and acting as Alcalde of said town, sold at public auction, and conveyed by deed of bargain and sale, to one Daniel O'Brien, on the 1st day of December, 1849, a certain lot in said city, described as the hundred vara lot one hundred and eighty-six, (186.) (See Transcript, p. 19.) The boundaries in the lot described in the complaint, and those set forth in the deed, are not identical, only because in the one case reference is made to the surrounding lots, and in the other to the neighboring streets. This title of O'Brien descended not to the *Plaintiff*, but to the *Defendant* in error.

Be it remembered, that the deed to O'Brien is, by the Water Lot Act, made admissible in evidence in any court of California, upon the trial of any cause in which the contents of the same may be important to be proved, and in the words of the statute, "shall be *prima facie* evidence of title and possession, to enable the Plaintiff to recover the possession of the land so granted." *A fortiori*, to defend a possession already obtained. (See Laws of California, 1857, p. 309. See plaintiff's brief, where it is quoted, p. 6.)

Before we quit this part of the subject, let us ask what was the object of the provision making the grant itself *prima facie* evidence of the right of possession?

The answer is obvious and simple. The Legislature were unwilling to bestow these lands upon the recipients of unconfirmed and unrecorded grants; but, looking to the crude and imperfect system that then obtained in the city government, (and this state of things is a part of the early history of California, of which the Court will take judicial cognizance,) they

knew that the intended boon would be a barren gift, in many instances at least, if it were coupled with the necessity of producing the legal evidence of a confirmation by an Ayuntamiento, one-third of whose proceedings were never recorded, and one-third of whose records were never preserved. Hence it was, that the holders of these grants were relieved of this onerous burden, which was cast upon their contestants.

So far, the Plaintiff not only fails to show that this lot was not excepted from the general grant to the city, but everything goes to prove that it was clearly included in the class of exceptions heretofore cited.

But says the counsel for the Plaintiff in error:

First.—The lot in controversy is not the lot which was sold and conveyed by Geary to O'Brien, because the O'Brien lot is bounded on the south by the bay, whilst the lot in controversy was, in 1849, covered by the waters of the bay at high tide; and, thereupon, we are furnished with a grand display of legal lore to prove that grants bounded by tide-water are confined to high land.

The answer to all this, is: In the first place, both in the complaint and in the deed to O'Brien, the lot is described as one hundred vara lot one hundred and eighty-six, (186,) on the official map of the City of San Francisco; and there is no *pretense*, much less *proof*, that there were two lots so marked and numbered on the said map. Any other or further description is intended more clearly to define the lot designed to be conveyed, and if, from mistake or error, it does not answer that purpose, it can be effective for no other. The hundred vara lot 186, whether it was high land or

covered with water, was sold and conveyed to O'Brien. Not only was the lot so conveyed, *eo nomine*, but for further certainty, and to show that there was no mistake in the number, it is described as bounded on the northwest by lot 180, and on the east by lot 170. There is no pretence that the lot in controversy is not so bounded. The result of the Plaintiffs' theory would be, that an erroneous statement of the condition of the property conveyed would void the grant; because it is certain that if the Alcalde did not sell and convey to O'Brien lot 186, the identical lot in controversy, he sold and conveyed to him no lot in the City of San Francisco; for there is no other, either above or beneath the waters, to which the description of the grant would apply.

But to any one conversant with the map and the history of the City of San Francisco, as is the author of the Plaintiff's brief—for we observe that it bears upon its cover the imprint of that city—this apparent incongruity is easily explained. This is an argument intended for foreign and not domestic use.

In 1849, the eastern and southern front of the City of San Francisco bordered on mud flats, which at high water were covered to the depth of eight or ten inches with the waters of the bay. Health, convenience, and shipping facilities required that these flats should be reclaimed. For this purpose, the streets and boundaries of the city were projected on the official map of the city into the bay. Then the line that marked the eastern and southern boundary of the city on the official map was called the line of the bay. As this projection preceded the actual reclamation, and, indeed,

was considered as authority for what would have otherwise been a nuisance, an actual survey and location, according to the said map, would have run the line of the bay far below high-water mark. When the Alcalde describes lot 186 as bounded on the south by the bay, he intends only to recite the fact that the southern boundary of this lot coincided with the southern boundary of the southern projection into the bay of San Francisco.

The next point made by the Plaintiff is, that it does not appear that the sale and grant to O'Brien was ever confirmed by the Ayuntamiento or City Council. Here, again, we claim that our deed is *prima facie* evidence of such confirmation, which it is incumbent on him to rebut by positive and conclusive evidence. None such appears in the finding of the facts. On the contrary, the facts disclosed by the special verdict are not only inconsistent with the theory of such confirmation, but strongly tend to induce the moral conviction that the sale and grant not only met the approbation of the City Council, but that both were made under their authority and in pursuance of their directions.

Let us consider what the Legislature of California intended by requiring that the individual purchase and grants should be "confirmed." Either in a technical sense or common parlance, we apprehend, this provision would be construed to extend no further than to require the assent of the Council, either express or implied, to the sale made by the Alcalde. Nothing is better understood than the technical meaning of the affirmation or confirmation of a sale. It may be either

express or implied. The acceptance of the purchase money will operate as a confirmation, by the owner, of a sale he had not authorized. If, then, the City Council did not direct the sale to be made, but, with a full knowledge that such sale had been made, they demanded or accepted the purchase money on behalf of the city, they, undoubtedly, *confirmed* the sale. So that the onus lies upon the Plaintiff of showing that the Council repudiated the sale made by Geary, and refused to receive the sum of three hundred and five dollars, the purchase money which Geary acknowledges to have received in trust for the city. (See Geary's grant, page 11, of the Transcript.) This he totally fails to do. Nay, more: it appears affirmatively, (see page 12 of the Transcript,) that on the 7th day of January, 1850, after the sale of 10th December, 1849, the Council passed a resolution authorizing the Alcalde "to notify all persons who have purchased town lots at any of the *former sales by auction* that they are required to come forward and pay the balance due, and take out their deed within ten days," thereby, unequivocally, confirming all the former sales by auction, of which the sale by O'Brien is admitted to be one.

It appears, moreover, that on the first day of December, 1849, (see page 10 of the Transcript,) the Council ordered a sale to be made on the 10th December of 200 fifty vara lots, and that this lot was sold on that day to O'Brien at public auction. It is impossible to imagine that the sale thus publicly made was not included in the return of the officer making the sale, or that it was unknown to the Council, or met their disapproval.

There is no fact that has the slightest tendency to authorize any one of these propositions, and yet positive proof of all of them is necessary to the Plaintiff's success.

This ordinance of the 1st of December, 1849, is pointed to by the Plaintiff as evidence that the sale of the hundred vara lot was not ordered by the Council.

It was, he says, only fifty vara lots that vere ordered to be sold. We have already attempted to show that it was immaterial, if the Council affirmed the sale, whether they ordered it or not. But the supposition that the Council assented to this sale by ordering it, is not only not refuted by the facts, but it follows almost inevitably from these facts that they did order it.

In the first place, the unimpeached and uncontradicted officer of the town solemnly asserts, in his official deed, (see page 11 of Transcript,) that the lot sold to O'Brien was in the list of those ordered to be sold by the resolution of the first of December. All the intendments are in favor of the authority of an official act of a duly elected officer. But, says the Plaintiff, we rebut this presumption by the production of the resolution, which refers only to the fifty vara lots.

We might answer that it does not appear that this was the only resolution passed on the 1st of December in relation to lots to be sold on the 10th. But, presuming that it was—an admission we do not make—it is very clear that the brief memorandum of the resolution made by the clerk does not embody the whole action of the Council in the premises. It is

not to be presumed that they stopped at the general declaration that two hundred fifty vara lots should be sold at public auction.

There can be no doubt that the resolution referred to certain specified lots, and there can be as little doubt that in this enumeration was comprised the hundred vara lot 186. Nor is it difficult to understand how this hundred vara lot got into the category of the fifty vara lots. When the city limits were extended upon the south, the lots in the new survey were laid off in the shape and form of one hundred varas square; but every hundred vara lot was divided into four fifty vara lots, each of which was numbered, as well as the hundred vara lot of which it formed a component part. Now, in all probability the tier of fifty vara lots ordered to be sold on the 10th of December comprised two hundred fifty-vara lots in the new or hundred vara survey; but the arbitrary or artificial line of the bay—the line, as we have before explained, to which the city limits were pushed on the map of the city—cut the southern extremity of this tier of hundred vara lots obliquely, leaving the portion included in the city limits of an irregular shape, and in quantity neither corresponding to the hundred vara lot, nor the fifty vara lot, nor what was technically known as a water lot. Hence, from their irregularity in shape and size, they were denominated fractional hundred vara lots. Thus it was that these fractional lots, lying at the southern extremity of the tier of fifty-vara lots, in the hundred vara survey, were included in the list of the fifty-vara lots ordered to be sold on the 10th of December, 1849.

If it be urged that all this is assumption unsustained by proof, we answer that we have the right to any theory or any assumption that will defeat the Plaintiff's claim which is not inconsistent with the facts of the record; for it is the Plaintiff's part to establish his title by facts that are inconsistent with the theory of his want of title.

We think we have said enough to show that there is nothing in the record to rebut the presumption of confirmation by the Council of O'Brien's purchase and grant.

But the Plaintiff, as a last resort, says, that if we came within the requirements of sale and confirmation, our grant lacks the essential of registration.

There is no doubt, to take 186 out of the general grant to the city, O'Brien's grant must not only have been made by an Alcalde, and approved by the Council, but it must have been "registered or recorded in some book of record in the office or custody or control of the County of San Francisco, on or before the 3d day of April, 1850." On this point the proof is clear and explicit. The jury not only find that the grant to O'Brien was recorded in a particular manner, but that this, as well as all the other grants made by Geary, were recorded in no other manner.

(See p. 13 of the Transcript.)

It seems that, instead of inscribing the grant upon the blank pages of a book ready bound, the Alcalde filed in his office a duplicate of the grant, to be bound into a book at a future time.

This was an efficient and cheap mode of preserving

the record of his grants. At that time clerical wages were enormously high, and the employment of a sufficient number of clerks to transcribe the numerous grants of the day would have entailed a serious burden upon the impoverished municipality. To save this expense, the frugal Alcalde caused blanks to be printed, two of which were filled up—one was delivered to the grantee, the other was filed as a page for a future book.

It is claimed that such registration does not come within the letter or spirit of the Water Lot Act.

Notwithstanding the very respectable source from which this objection comes, it appears so frivolous that we hesitate to engage the Court in a consideration of its refutation.

To suppose that it was the intention of the Legislature to favor those purchasers whose record had been submitted to the hands of a book-binder, and to frown upon those who had not been operated upon by this worthy artizan, is to ascribe to this dignified body a degree of folly that almost amounts to *scandalum magnatum*. If there be anything in the argument of the Plaintiff's counsel, the matter in a book is made for the binding, not the binding for the matter.

He virtually claims that the period between the 26th of March and the 30th day of April was provided by the Legislature within which the grantees of Geary should have the records of their grants incorporated into a book; failing which, they should forfeit their right to the subject of their purchase.

To reduce this argument to the *reductio ad absur-*

dum, it would come to this: That a book of records falling to decay and the sheets becoming loose, during the period between the destruction of the old binding and the rebinding, there would be no "book of records."

We will be content to take leave of the Plaintiff's counsel with the reproof couched in the old law maxim—*qui hæret in literis, hæret in cortice.*

All of which is respectfully submitted.

C. T. BOTTS,

Of Counsel for Defendant.

Chief Justice

No. 29

IN THE

SUPREME COURT

OF THE UNITED STATES.

JAMES E. MUNFORD,
Plaintiff in Error,

VERSUS

C. OTIS WARDWELL,
Defendant in Error.

BRIEF OF APPELLANT.

~~JOHN B. HARMON,~~
~~Of Counsel for Appellant.~~

SAN FRANCISCO:
MULLIN, MAHON & CO., PRINTERS, Cor. CLAY & SANSOME STS
1867.

In the Supreme Court

OF THE UNITED STATES.

JAMES E MUNFORD,
Plaintiff in Error.

vs.

C. OTIS WARDWELL,
Defendant in Error.

BRIEF OF APPELLANT.

In addition to the Brief already filed, appellant desires to elaborate one or two of the points therein made.

We wish, at the outset, to state that the judgment of the Court below was *pro forma* and without special examination of the case; and that a reversal of the judgment will not establish principles tending to uproot the title to any other 100-vara lots held under sales by Alcalde Geary, on the 10th of December, 1849.

The ordinance of the Ayuntamiento of San Francisco, under which those sales were made, is in these words, to wit:

"Be it ordained that 200 fifty-vara town lots be sold at public auction, on Friday, the 10th inst."

Notwithstanding the limitation to fifty-vara town lots, it seems the Alcalde sold some 100-vara lots: and the deed by him to the predecessor of defendant describes the lot sold as "*hundred vara* lot numbered one hundred and eighty-six," etc. But it is unnecessary, in this case, to question the validity of sales of *upland* 100-vara lots by virtue of the Ordinance above quoted, because, this lot in controversy being below ordinary high water mark, the Alcalde had no authority, either under his general powers as Alcalde, or under the Ordinance to sell or grant it.

It might be argued as to upland lots that the Alcalde had power *as Alcalde* to grant them, and could convey 100-vara lots, although the Ordinance restricted his sales at auction to 50-vara lots. Here, however, that question does not arise. The lot being below ordinary high water mark, the City of San Francisco had no title to it, and the Alcalde's sale and deed *by themselves* conveyed nothing.

The title on the day of sale, December 10th, 1849, was in the United States, and upon the ad-

mission of California into the Union, September 9th, 1850, that title passed to the State, and from the State it passed to the City of San Francisco by the Act of March 26th, 1851, and to the plaintiff's predecessor by execution sale against the city in February, 1858. The question therefore, is simply: has the defendant shown any conveyance or grant from the State?

POINT I.

The only pretence of such grant is by the 2d section of the Act of the Legislature, known as the "San Francisco Water Lot Act" (Laws 1851, 309) in these words:

"§ 2. The use and occupation of all the land described in the first section of this Act is hereby granted to the City of San Francisco for the term of ninety-nine years from the date of this Act; except as hereinafter provided; all the lands mentioned in the first section of this Act, which have been sold by authority of the Ayuntamiento, or town, or City Council, or by any Alcalde of the said town or city, at public auction, in accordance with the terms of the grant known as Kearny's grant to the City of San Francisco; or which have been sold or granted by any Alcalde of the said City of San Francisco, and confirmed by the Ayuntamiento, or town, or City Council thereof, and also registered or recorded in some

book of record now in the office, or custody, or control, of the Recorder of the County of San Francisco, on or before the third day of April, A. D. one thousand eight hundred and fifty, shall be, and the same are hereby granted and confirmed to the purchaser or purchasers or grantees aforesaid, by the State relinquishing the use and occupation of the same and her interests therein to the said purchasers or grantees, and each of them, their heirs and assigns, or any person or persons holding under them, for the term of ninety-nine years, from and after the passage of this Act: Provided, That the City of San Francisco shall pay into the State Treasury twenty-five per cent. of all moneys hereafter arising in any way from the sale or other disposition of the property described in the first section of this Act; the same to be paid within twenty days after its receipt by said city. The property known as the Goverment Reservation is exempt from the operation of this Act; except that any estate held by virtue of any lease or leases, executed or confirmed by any officer of the United States, on behalf of the same, shall be and the same are hereby granted and confirmed to the lessees thereof, and the written instrument whereby such lease or leases was made shall, in all actions brought by the lessees for the recovery of the lands so demised, be sufficient evidence of title and possession to enable the plaintiff to recover."

This section of the Act grants the use and occupation of the lot in dispute for ninety-nine years to the City of San Francisco, under which plaintiff deraigns title, unless it is within one of the two exceptions named.

POINT II.

It devolves on defendant to bring himself clearly within one of the exceptions. Prima facie, the title is in plaintiff—the 2d finding of the verdict being that the lot is within the boundaries described in the 1st section of the Water Lot Act.

That this lot does not come within the 1st exception is clear. That exception by its terms embraces *Kearny grant lots only;* and these were beach and water lots on the east or front side of the city, while lot 186 is on the south side.

The exception is: "All the lands mentioned in the first section of this Act, which have been *sold by authority of the Ayuntamiento, or town, or City Council*, or by "*any Alcalde*" of the said town or city, at public auction, in accordance with the terms of the grant known as *Kearny's grant to the City of San Francisco.*"

The sales of lands within this exception are confirmed by the Water Lot Act. That is, the sales having passed no title, because the city had none, the State by this confirmation grants the land.

What sales of Kearny grant lots were made by the Ayuntamiento?"

The sales made January 3d, 1850. (See 19th, 20th, 29th, 30th and 31st Findings.)

What sales were made by "*any Alcalde*" at public auction, in accordance with the terms of the Kearny grant?

The sales made July 20th, 21st, 22d, 1847, and no others. (See 8th Finding.)

So far as this 1st exception is concerned the confirmatory clauses are met by these sales of water lots.

Indeed, defendant's Brief, signed by Messrs. Dwinelle & Lake, does not claim that the lot here comes within the terms of this 1st exception.

The 2d exception is: "or which have been granted sold or by *any Alcalde* of the said City of San Francisco and *confirmed by the Ayuntamiento*, or town, or City Council thereof, and also registered or recorded in some book of record now in the office, or custody, or control, of the Recorder of the County of San Francisco, on or before the third day of April, A. D. 1850," etc.

What lands were sold or granted by any Alcalde and afterwards *confirmed* by the Ayuntamiento?

The sales of Kearny grant water lots by Alcalde Leavenworth, between January 1st and August 1st, 1849. (See 10th, 11th, 12th, 13th,

14th, 15th, 16th, 17th, 18th, 28th, 32d, 33d, 34th, 35th Findings.)

These sales and grants by Leavenworth, who acted as Alcalde when there was no Ayuntamiento, were considered illegal, and as therefore needing confirmation. He granted them on private petition, instead of selling them at public auction on three months prior notice, as the Kearny grant required.

These Leavenworth grants, therefore, meet the terms of the confirmatory clause of the Act of 1851 so far as the 2d exception is concerned.

There is nothing in any of the findings which shows that this sale by Geary on the 10th of December, 1849, was *confirmed* by the Ayuntamiento. It needed no confirmation. It was expressly authorized by the Ayuntamiento. (Finding 26.) That body having passed a resolution prohibiting the Alcalde from selling or granting land except under its special direction (Finding 17), and then having authorized him to sell 200 *fifty-vara* lots on the 10th day of December, assumed that he would follow his authority, and consequently that all his sales would be valid. No confirmation, therefore, could be expected and none is found.

The *onus* is upon defendant to prove such confirmation, if he rely on this 2d exception.

The whole scope of the confirmatory clause, in the Water Lot Act, is to *give title to the Kearny*

grant beach and water lots. General Kearny supposing he had power to pass these water lots to the city, made his grant. The city regarding the grant as valid, acted under it. Later, it became generally understood that the grant was void for want of power, and that the title to lots below ordinary high water mark, and within the grant, was still in the State. This title the State, by the Act of 1851, relinquished to the city—excepting, as matter of equity, certain lots, to wit: 1st. Those sold under the Kearny grant at public auction, and *in accordance with its terms.* 2d. Those *not so sold*, but sold or granted *irregularly*—that is, without authority of the Ayuntamiento and not on three months notice, but afterwards *confirmed* by that body.

The State had no title to the upland lots, and hence cannot be presumed to have intended, by the Act of 1851, to confirm the title to such lots. The enacting clause is: "An Act to provide for the disposition of certain *property of the State of California.*" Upon the property of the State, and on that only, can this Act operate. This fact of itself, shows conclusively that the lot in controversy is not within either of the exceptions of the Act; because there can be no pretense that it is within the boundaries of the Kearny grant—not within a mile of them.

The exceptions in the Act of 1851 must be

construed with reference to their subject matter, to wit: the *Kearny grant* Water Lots. There were two defects in the titles to those lots so far as they were held by individuals under conveyances from the city. The one was, entire absence of title in the city at the time of conveyance, because of General Kearny's incapacity to grant the lands of the United States. The other was the irregular and defective conveyances from the city by Alcalde Leavenworth. He had sold at private sale, and granted on private petition, some of these Kearny grant water lots. This was contrary to the express terms of the grant, and contrary to the uniform practice of the city authorities. Both of these defects the Act of 1851 cured by the exceptions contained in the 2d Section.

Defendant attempts to bring himself within the 2d exception, to wit: of lands "sold or granted by any Alcalde of the City of San Francisco and confirmed by the Ayuntamiento, or Town or City Council thereof," etc., by saying: 1st. That it does not appear from the record whether the lot in controversy is within the boundaries of the Kearny grant; 2d. that, under section 3 of the Act of 1851, the deed by Alcalde Geary to O'Brien, defendant's predecessor in interest, is *prima facie* evidence of *confirmation* by the Ayuntamiento.

1st. The answer to the 1st suggestion is that it

falls by its own weight; because to come within this exception, the lot *must be within the Kearny grant:* and if this fact does not appear by the record, a fact essential to defendant's title is wanting.

But the record shows affirmatively that the lot is not within the Kearny grant. The grant is of "beach and water lots on the *east front* of said town of San Francisco, included *between* the points known as the Rincon and Fort Montgomery." This tract was divided into lots 45 *feet* 10 *inches front by* 137½ *feet deep.* (8th Finding.)

The lot in dispute, on the other hand, is "*hundred-vara* lot numbered one hundred and eighty-six, situated in said town on the bay of San Francisco, bounded on the northwest by lot one hundred and eighty, on the east by lot one hundred and seventy, and on the *south by said Bay*, being a fractional lot" (Transcript, fols. 39, 40.)

The description of this lot as a 100-*vara lot*, and as bounded *south by the Bay*, makes it impossible to bring it within the Kearny grant.

The record shows that the general system of the City Survey divides the land into 50-vara and 100-vara lots—the Kearny lots being neither one nor the other.

2d. The answer to the 2d suggestion, that the deed is *prima facie* evidence of *confirmation* by the Ayuntamiento is, that we rebut the presumption,

if any, afforded by the deed, when we show that the 2d section of the Act of 1851, applies to Kearny grant lots only; and that this lot is not within that grant.

The 3d section of the Act applies only to deeds of property embraced within the exceptions of the 2d section. All other lots are conveyed to the city by the 1st clause of said 2d section; and as to them there were no deeds to be made *prima facie* evidence. These lots did not constitute any part of the subject matter of the 3d section.

There was, however, a class of conveyances within the water line front, as estabtished by the Act of 1851, which the Legislature might make *prima facie* evidence of title and possession; to wit: conveyances under the Kearny grant. As to such conveyances it may be argued that they are made *prima facie* evidence of confirmation by the Ayuntamiento.

But even as to them the presumption created by the deed would be overcome by such proof as we introduced in this case.

3d. We also rebut the presumption when we show that the Alcalde recites as his authority for the sale and deed, a resolution of the Ayuntamiento passed December 1st, 1849, and that the resolution of that date put in evidence by us, embraced *fifty-vara* lots only, while the deed attempts to convey a fractional 100-vara lot.

Defendant argues that although the resolution in the record is confined to *fifty-vara* lots, still this does not exclude the possibility of another resolution at the same meeting, ordering *hundred-vara* lots to be sold ; and that this is necessary to rebut the presumption of the deed.

We submit, as the clear order of proof, the clear logic of presumptions as indulged in Courts of Justice, that when we put in evidence a resolution of a public body, like the Ayuntamiento. passed December 1st, 1849, ordering a sale of town lots to take place December 10th, 1849, corresponding exactly with the resolution recited by the Alcalde, as his authority for making a sale and a deed, it was incumbent on defendant to put in evidence a resolution of the same date authorizing a sale of the property described in the deed to O'Brien.

POINT III.

The lot described in the deed to O'Brien, under which defendant claims, does not embrace the lot in dispute: nor was there any intention on the part of the Alcalde, or the Ayuntamiento of San Francisco, to sell or convey said lot.

1st. That the deed does not embrace the lot in dispute is clear, because the lot described in the deed is *situated on the Bay* of San Francisco, bounded on the south *by the Bay;* while the lot in dispute

is entirely *covered* by the Bay, being *below the natural high-water mark*

(Finding 1.)

The two pieces of land cannot be the same, if this part of the description in the deed be followed. A lot cannot be situated *on* a Bay, and bounded on one side *by* the Bay, and yet be entirely covered by the *waters of* the Bay. This is a physical impossibility, and we need not resort to the well settled rules of law to determine the meaning of such a description.

But those rules are fixed, and accord with the natural interpretation of the language used in this description. By the common law the sovereign owns the land below ordinary high-water mark, in the shores and arms of the sea.

"The presumption of the law is always that this original right continues, unless the contrary is shown by express proof of private right by grant or prescription.'

Commissioners of Canal Fund vs. Kempshall, 26 Wend. 413-14.

Middleton vs. Pritchard, 3 Scamm. 520.

Storer vs. Freeman, 6 Mass. 435, 438, 439.

2 Washburn Real Prop. 633-4.

Hale de jure Maris, Part 1. ch. 5.

Comyns Dig. Tit. Navigation, A. B.

Hence, the rule that a grant of land, bounded *by* the sea, or a bay, or situated *on* the sea or a

bay, extends to *high-water mark only*. As the sovereign owns the land between ordinary high-water mark and low-water mark—that is, the shore of the sea, when he grants uplands, and bounds them *by* or *on* the sea, his language necessarily excludes any part of the shore. To pass that, we must *presume* the sovereign so intended, when his grant reads expressly to the contrary. The rule of presumption is the other way.

This rule applies with greater force where an individual owns land bordering on the sea or a bay, but has no title to the land beneath the waters of the sea or bay, and then conveys it by a deed describing the land as *situated on* the bay, and bounded on the south *by* the bay. Having no right to any land below ordinary high-water mark, he does not attempt to convey it; and accordingly adopts the most forcible, as well as natural description, and bounds the land he owns and intends to convey *by* the sea or bay.

In this case the Ayuntamiento, knowing the city of San Francisco had no title to land below ordinary high-water mark—except so far as the Kearny Grant lots were concerned, as to which it was thought there might be some right,—passed the Resolution of December 1st, 1849, authorizing a sale of 200 fifty vara lots; and the Alcalde, in pursuance of the Resolution, sells a lot, and executes a deed describing it as "said hundred

vara lot numbered one hundred and eighty-six, *situated on the Bay* of San Francisco, bounded on the northwest by lot one hundred and eighty; on the east by lot one hundred and seventy; *and on the south by said Bay, being a fractional lot*," etc.

Here we have—1st, the fact that the city had no title to the land beneath the waters of the Bay; 2d, the fact that the 50 vara and 100 vara lots were all upland lots, to which the city claimed and had title; 3d, the fact that *the deed expressly bounds the land conveyed by the Bay.*

and claimed to have,

Upon what rule of interpretation can a lot entirely covered by the waters of the Bay, to which the city neither had nor pretended to have title, be held to pass by such a description?

The Bay is a natural monument—and, as such, is a fixed and controlling boundary, which cannot be passed without violating the most fundamental rules of description. It would not be admissible, for example, to prove by parol that the grantor *intended* to convey land below ordinary high water mark. The boundary of, "*on* the Bay" and "south *by* the Bay" is plain, and does not admit of explanation.

2 Washburn, Real. Prop. 636, § 53.
Storer vs. Freeman, 6 Mass. 440.

In Storer vs. Freeman, 6 Mass. 436-439, the deed purported to convey 12½ acres of land with-

in certain boundaries, two of which were "running from a certain stake there described, N. 28 deg. W. *to the shore* of the neck; *thence by the shore* to other land of the said Caleb."

Chief Justice Parsons says: "The plaintiff's construction of the first deed is, that running *to* the shore is running to low water mark, and running *by* the shore is running by low water mark." And, "We must now return to the first deed; and, as it appears from the report of the Judge, that the shore mentioned in the deed is not covered with rock, but forms a beach, or flats, we shall for *shore* substitute *flats*. The land described will then extend to the flats, and be bounded by the flats. On this substitution the construction is manifest. The land conveyed extends *to* the flats, but not *over* them; and the flats being a *bound* of the land conveyed, are not a *part* of it."

See, also—

East Haven vs. Hemingway, 7 Conn. 186.
Middletown vs. Sage, 8 Conn. 221.

2d. Passing from the strict description in the deed to the intention as gathered from the whole case, and it is evident the Alcalde did not design to convey any land below ordinary high water mark.

First, he recites as authority the resolution to sell 50-vara lots, all of which are upland. Sec-

ond, he bounds the land sold by the Bay, thus excluding all land under its waters. Third, he describes the lot as "a *fractional lot.*" Fourth, the Ayuntamiento, about a month before passing the above resolution, ordered the City Surveyor to project the one hundred vara lots to the Mission Bay, and back to their junction on Market with Leavenworth streets.

(Finding 21.)

The whole secret of the Alcalde's attempt to sell and convey any part of the one hundred vara lots under the resolution to sell 200 *fifty-vara* lots, is found in that part of his description where this lot is called "a *fractional* lot."

There was no survey on the ground. The 100 vara lots were *projected to* Mission Bay. Precisely where the line of ordinary high water mark, the limit of the city's land, was, neither the Surveyor, the Ayuntamiento, nor the Alcalde knew. But, assuming that the line was far enough *south* to embrace a *fraction* of a 100 vara lot, the Surveyor marks down lot number 186; and, as this fraction might be as much as *fifty-varas*, the Alcalde doubtless deemed himself justified in selling it under the resolution. His deed calls it a 100 vara lot, simply because its locality is among the 100 vara lots as numbered on the City Map.

But the truth turns out to be, that *there was no fractional lot there;* and, consequently, as a frac-